

No. 13654

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United States  
Court of Appeals  
for the Ninth Circuit.

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UNITED STATES OF AMERICA,  
Appellant,  
vs.  
GERALD J. TRUBOW,  
Appellee.

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Transcript of Record

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Appeal from the United States District Court  
Northern District of California,  
Southern Division.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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**NAMES AND ADDRESSES OF ATTORNEYS**

**CHAUNCEY TRAMUTOLO, ESQ.,**  
United States Attorney.

**FREDERICK J. WOELFLEN, ESQ.,**  
Assistant United States Attorney,  
San Francisco, California,  
Attorneys for Appellant.

**BEN K. LERER, ESQ.,**  
655 Mills Tower,  
San Francisco, California,  
Attorney for Appellee.



In the District Court of the United States,  
for the Northern District of California  
(Southern Division)

No. 29,077—H

GERALD J. TRUBOW,

Plaintiff,

vs.

UNITED STATES OF AMERICA, FIRST DOE,  
SECOND DOE, THIRD DOE, BLACK &  
WHITE COMPANY, a copartnership, and  
RED COMPANY, a corporation,  
Defendants.

COMPLAINT UNDER FEDERAL TORT  
CLAIMS ACT

Now comes the plaintiff and for cause of action  
alleges:

I.

That the names of the defendants sued herein  
as First Doe, Second Doe, Third Doe, Black and  
White Company, a copartnership, and Red Company,  
a corporation, are fictitious names and said defend-  
ants are so impleaded for the reason that plaintiff  
does not know their true names and plaintiff prays  
leave that when the true names of the said defend-  
ants are ascertained that he may be permitted to  
amend this complaint to insert the same herein, to-  
gether with appropriate allegations respecting the  
connection of said defendants in this action.

## II.

That at all times herein mentioned this action is brought pursuant to the provisions of the Federal Tort Claims Act effective August 2, 1946, being titled Four, Public Law 601, Chapter 753, 79th Congress, 2nd Session.

## III.

That at all times herein mentioned said defendant United States of America was the owner and in possession and having control of those certain premises, together with the building and improvements thereon, known and designated as the Marine Hospital, located in the vicinity of 14th Avenue and Lake Street in the City and County of San Francisco, State of California, hereinafter referred to as said "Marine Hospital"; that said land and building was known and there used and maintained by the said defendant United States of America as a hospital;

## IV.

That at all times herein mentioned, the Scrap & Metal Company of San Francisco had an agreement with the defendants herein whereby the employees of said Scrap & Metal Company were to enter upon the premises of said defendants for the purpose of picking up certain refrigerators and beds and for the removal of the same.

## V.

That at all times herein mentioned the plaintiff herein was acting within the full scope of his employment as an employee of said Scrap & Metal Company of San Francisco, occupying the position

of foreman thereof, and carrying out the terms of said agreement hereinabove referred to with the said defendants in the status of foreman.

#### VI.

That at all times herein mentioned the general public, visitors and business visitors were invited and permitted upon the premises of said Marine Hospital and to use the elevator and freight elevator located in said Marine Hospital, hereinafter referred to as said "freight elevator".

#### VII.

That at all times herein mentioned the defendants maintained, controlled, operated the said freight elevator which the said visitors and patrons and business visitors of said hospital were invited by said defendants to use.

#### VIII.

That on or about the 22nd day of April, 1949, at or about the hour of 2:30 o'clock p.m., said plaintiff was upon the premises of said Marine Hospital in the capacity of foreman for the Scrap & Metal Company of San Francisco, pursuant to the agreement hereinabove referred to whereby said plaintiff was to supervise the picking up of certain refrigerators and beds and for the removal of the same; that in pursuance thereof it was necessary for the plaintiff to use a certain freight elevator located on said Marine Hospital premises; that said plaintiff was using the said freight elevator with the

permission and invitation of the said defendants; that on or about the said 22nd day of April, 1949, plaintiff after entering on the said premises of the said defendant for the purposes hereinabove referred to, and while plaintiff was using the freight elevator hereinabove referred to, at the invitation of the said defendants as aforesaid, the defendants so negligently and carelessly constructed, maintained, operated and controlled said freight elevator, and the doors of said freight elevator, that the said upper and lower doors of the said freight elevator came together with such force and violence and speed as to cause the plaintiff to catch his right hand between the said doors of said elevator, causing the right hand of said plaintiff to sustain an oblique fracture through the distal end of the shaft of the third metacarpal and bruising said plaintiff about his body and shaking him up internally and causing said plaintiff to suffer intense pain and made said plaintiff unable to attend to his business.

#### IX.

Plaintiff is informed and believes and therefore alleges that the injuries so sustained are permanent in nature.

#### X.

That the negligent and careless manner in which the said defendants constructed, maintained, con-immediate and proximate cause of the injuries received by the plaintiff.

## XI.

That by reason of the carelessness and negligence of the defendants as aforesaid, and by reason of the injuries so sustained, said plaintiff has necessarily incurred liability for the services of a physician and surgeon in an amount not capable of being fixed or determined at this time, and plaintiff here prays leave that when the said amount is fixed and determined that he may be permitted to amend this complaint to insert the amount thereof.

## XII.

That by reason of the carelessness and negligence of the defendants as aforesaid, and by reason of the injuries so sustained, said plaintiff has necessarily incurred liability for x-rays in the sum of Fifteen Dollars (\$15.00), which is a reasonable charge therefor, and of which no part of the whole of said sum has been paid. Plaintiff is informed and believes that there will be further x-rays and prays leave of Court to amend accordingly when the exact amounts are ascertained.

## XIII.

That by reason of the carelessness and negligence of the defendants as aforesaid, and by reason of the injuries so sustained, plaintiff was further injured in general damages in the sum of Twenty Thousand Dollars (\$20,000.00), of which no part or the whole of said sum has been paid.

## XIV.

That plaintiff was at the time of said injuries employed as the foreman of the Scrap and Metal

Company in San Francisco and was earning the sum of Four Hundred Dollars (\$400.00) per month; that as a result of said injuries the plaintiff has been unable to work since said time on account of the injury to his right hand, and has been damaged thereby in the sum of Four Hundred Dollars (\$400.00) per month since the date of said injury, and that he will continue to be damaged at the rate of Four Hundred Dollars (\$400.00) per month for an indefinite time in the future which plaintiff is unable to state at this time.

XV.

Wherefore, plaintiff prays judgment against defendants for the sum of Twenty Thousand Dollars (\$20,000.00) general damages; One Thousand Six Hundred Dollars (\$1,600.00) loss of earnings; for the expense incurred for x-rays when the amount is ascertained, and for the liability incurred for the services of a physician and surgeon when the same is ascertained, and for such other and further relief as the Court may deem meet and proper in the premises.

/s/ BEN K. LERER,  
Attorney for Plaintiff.

State of California,  
City and County of San Francisco—ss.

Gerald Trubow, being first duly sworn, deposes and says:

That he is the plaintiff in the foregoing complaint; that he has read the same and knows it to



be true of his own knowledge except as to matters stated therein on information or belief and as to those matters that he believes it to be true.

/s/ GERALD TRUBOW.

Subscribed and sworn to before me this 22nd day of July, 1949.

[Seal]        /s/ GERALDINE D. COHEN,  
Notary Public in and for the City and County of  
San Francisco, State of California.

My Commission expires January 11, 1953.

[Endorsed]: Filed August 17, 1949.

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[Title of District Court and Cause.]

### NOTICE AND MOTION TO DISMISS

Comes now Frank J. Hennessy, United States Attorney for the Northern District of California, Southern Division, and moves on behalf of the defendant, United States of America, that this action be dismissed on the ground that the Federal Tort Claims Act does not authorize the maintenance of suits against the United States and other parties.

Said motion will be made on Monday the 16th day of January, 1950, at the hour of 10:00 a.m. thereof, before Honorable Louis E. Goodman, and will be based upon all the papers, records and files

in this action and upon the ground that only the United States can be sued in tort.

Respectfully submitted,

/s/ FRANK J. HENNESSY,  
United States Attorney,  
Attorney for Defendant United  
States of America.

Points and Authorities  
Federal Tort Claims Act, Public Law 601, Title 4.  
[Endorsed]: Filed January 10, 1950.

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[Title of District Court and Cause.]

DISMISSAL WITHOUT PREJUDICE

To the Clerk of Said Court:

You are hereby authorized and directed to enter dismissal of the above entitled action as against defendants, First Doe, Second Doe, Third Doe, Black & White Company, a co-partnership, and Red Company, a corporation, Only, without prejudice.

Dated: January 11, 1950.

/s/ BEN K. LERER,  
Attorney for Plaintiff.

[Endorsed]: Filed January 13, 1950.

[Title of District Court and Cause.]

ANSWER

Now comes the defendant and answering the complaint herein, denies and alleges as follows:

I.

Denies all the allegations of paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV and XV.

For a further and separate answer this defendant alleges:

I.

That the injury alleged in paragraph VIII of the complaint herein was proximately caused by the negligence and carelessness of the plaintiff herein and that plaintiff was himself careless and negligent in and about all the matters complained of herein.

For a further and separate answer this defendant alleges:

I.

That plaintiff herein had the status of a licensee and came on the premises and into the elevator referred to in paragraph VI of said complaint for purposes of his own, thereby assuming all of the risks incident to the condition of the premises.

And for a further and separate answer this defendant alleges:

I.

That the defendant United States of America

owed the plaintiff herein no duty of care in and about all of the matters complained of herein.

Wherefore the plaintiff prays that the complaint be dismissed and that it have its costs incurred herein.

/s/ FRANK J. HENNESSY,  
 United States Attorney,  
 /s/ By CHARLES O'GARA,  
 Asst. United States Attorney,  
 Attorneys for Defendant,  
 United States of America.

[Endorsed]: Filed March 31, 1950.

[Title of District Court and Cause.]

### ORDER FOR JUDGMENT

The court finds that plaintiff is entitled to judgment for the following amounts:

Loss of earnings.....	\$ 400.00
Services of physician and surgeon....	193.49
X-rays .....	15.00
General damages for personal injuries	2,000.00

Total.....\$2,608.49

Findings of fact, conclusions of law, and judgment thereon in accordance with the foregoing to be prepared by plaintiff.

Dated: January 16, 1951.

/s/ OLIVER J. CARTER,  
 U. S. District Judge.

[Endorsed]: Filed January 16, 1951.

[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial on the 5th day of January, 1951, before the Honorable Oliver J. Carter, United States District Judge, sitting without a jury; Charles O'Gara, Esq., Assistant United States Attorney, appearing on behalf of defendant, and Ben K. Lerer, Esq., appearing on behalf of plaintiff; oral and documentary evidence having been introduced on behalf of both parties; and the court, having duly considered the facts and the law, now makes the following:

### FINDINGS OF FACT

1. All of the allegations of paragraphs II, III, VI, VII, IX, X, XI and XII of the first cause of action of plaintiff, Gerald J. Trubow, as set forth in the complaint on file herein, are true, and all of the allegations of paragraphs IV, VIII and XIV of said cause of action, as amended in open court, are true.

2. As a result of the negligence of the defendant mentioned in the complaint on file herein, plaintiff was injured and damaged in the sum of Two Thousand Six Hundred Eight Dollars and forty-nine cents (\$2,608.49).

3. The attorney for plaintiff is entitled to attorney's fee in the sum of Five Hundred Twenty

One Dollars and seventy cents (\$521.70), which sum is not in excess of twenty per cent (20%) of the amount recovered by plaintiff, and which sum is a reasonable attorney's fee.

From the foregoing findings of fact, the court makes the following:

### CONCLUSIONS OF LAW

1. Plaintiff is entitled to judgment against the defendant in the sum of Two Thousand Six Hundred Eight Dollars and forty-nine cents (\$2,608.49).

2. Attorney for plaintiff is allowed Five Hundred Twenty One Dollars and seventy cents (\$521.70) of the judgment herein, as attorney's fee.

3. Plaintiff is entitled to judgment against the defendant for his costs of suit incurred in this action.

Let judgment for plaintiff be entered accordingly.

Done this 29th day of January, 1951.

/s/ OLIVER J. CARTER,  
U. S. District Judge.

Approved this 22nd day of January, 1951.

/s/ FRANK J. HENNESSY,  
United States Attorney,  
Attorney for Defendant.

[Endorsed]: Filed January 29, 1951.

In the United States District Court for the  
Northern District of California,  
Southern Division

No. 29077—H

GERALD J. TRUBOW,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

### JUDGMENT

The above entitled cause came on regularly for trial on January 5, 1951 before the Honorable Oliver J. Carter, United States District Judge, sitting without a jury; Charles O'Gara, Esq., Assistant United States Attorney, appearing on behalf of defendant, and Ben K. Lerer, Esq., appearing on behalf of plaintiff; oral and documentary evidence having been introduced on behalf of both parties; and the court heretofore having made and caused to be filed herein its written findings of fact and conclusions of law, and being fully advised:

Wherefore, by reason of the law and the findings of fact aforesaid, it is Ordered, Adjudged and Decreed that plaintiff have and recover against the defendant in the sum of Two Thousand Six Hundred Eight Dollars and forty-nine cents (\$2,608.49); and

It is further Ordered, Adjudged and Decreed that the attorney for plaintiff be and he is allowed

Five Hundred Twenty One Dollars and seventy cents (\$521.70) of the judgment herein as attorney's fee; and

It is further Ordered, Adjudged and Decreed that plaintiff have and recover his costs of suit herein from defendant, amounting to the sum of Twelve Dollars and seventy five cents (\$12.75).

Dated: January 29, 1951.

/s/ OLIVER J. CARTER,  
U. S. District Judge.

Approved as to form, as provided in Rule 5(d).

/s/ FRANK J. HENNESSY,  
United States Attorney,  
Attorney for Defendant.

Entered in Civil Docket Jan. 30, 1951.

[Endorsed]: Filed January 29, 1951.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Comes now the defendant, United States of America, appearing by Frank J. Hennessy, United States Attorney for the Northern District of California, and hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment entered by the United States District Court for the Northern District of California in



favor of the plaintiff and against said defendant on January 30, 1951.

Dated: March 16, 1951.

/s/ FRANK J. HENNESSY,  
United States Attorney,  
/s/ By CHARLES O'GARA,  
Assistant U. S. Attorney,  
Attorneys for Defendant.

[Endorsed]: Filed March 16, 1951.

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[Title of District Court and Cause.]

#### DESIGNATION OF RECORD ON APPEAL

Defendant, having filed its Notice of Appeal in the above-entitled action, hereby designates the record on appeal as follows:

The entire record in the District Court including the pleadings, motions, orders, transcript, all exhibits, findings of fact, conclusions of law, judgment and notice of appeal.

Dated: May 24, 1951.

/s/ CHAUNCEY TRAMUTOLO,  
United States Attorney,  
/s/ By R. A. McMILLAN,  
Asst. United States Attorney,  
Attorneys for Defendant.

[Endorsed]: Filed May 24, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD  
ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court, or true copies of orders entered in this Court, in the above-entitled case, and that they constitute the record on appeal herein as designated by the attorneys for the appellant:

Complaint under Federal Tort Claims Act.

Notice and Motion to Dismiss.

Dismissal without Prejudice as to "Does".

Answer.

Minutes of January 5, 1951.

Minutes of January 8, 1951.

Minutes of January 12, 1951.

Order for Judgment in Favor of Plaintiff.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Appeal.

Order Extending Time to Docket Record on Appeal.

Designation of Record on Appeal.

One volume of the Reporter's Transcript.

Plaintiff's Exhibits 1 to 6.

Defendant's Exhibits A to N.

In Witness Whereof I have hereunto set my hand

and affixed the seal of said District Court this 29th day of May, 1951.

[Seal] C. W. CALBREATH,  
Clerk.

In the Southern Division of the United States  
District Court for the Northern District  
of California  
No. 29077-C

GERALD J. TRUBOW,  
Plaintiff,  
vs.  
UNITED STATES OF AMERICA,  
Defendant.

Before: Hon. Oliver J. Carter, Judge.

REPORTER'S TRANSCRIPT  
January 5, 1951

Appearances:

For the Plaintiff: Ben K. Lerer, Esq.

For the Government: Charles H. O'Gara, Esq.

\* \* \* \* \*

The Court: Yes. Then, Mr. Lerer, if you desire to make a motion to amend your pleadings, I would like to hear your motion and in what manner. Then if there are any objections to be made, Mr. O'Gara, you may make them. Will you proceed, Mr. Lerer? [6\*]

\*Page numbering appearing at top of page of original certified Reporter's Transcript.

Mr. Lerer: I take it we stipulate, Your Honor, that paragraph 3 can be admitted; namely, that it is a governmental agency and that the property was held under the ownership and possession and control of the United States of America for the purpose of the record? Can we, Mr. O'Gara?

Mr. O'Gara: Yes, we will stipulate to that.

The Court: That stipulation will be accepted by the Court.

Mr. Lerer: Paragraph 4, Your Honor, we would like to amend to read: "That at all times herein mentioned plaintiff had an agreement with the defendants herein whereby plaintiff could enter upon the premises of said defendants for the purpose of picking up certain refrigerators and for the removal of the same, and at all times herein mentioned plaintiff was an invitee."

The plaintiff was—I should correct that. That should be: "—the plaintiff was an invitee of the defendants." I am excluding there, Your Honor, the word "beds", which through some misunderstanding was included in the complaint. It was my understanding that the plaintiff was going out there to get refrigerators and beds and——

The Court: You are not talking about——

Mr. Lerer: Paragraph 4, Your Honor.

The Court: Oh, paragraph 4.

Mr. Lerer: To pick up certain refrigerators and beds.

The Court: It says that at all times herein mentioned the [7] Scrap Metal Company——

Mr. Lerer: Well, I was getting to that. Num-

ber 1 is to exclude "beds" and also to exclude that part, "that the Scrap Metal Company of San Francisco \* \* \*"

The Court: You want to——

Mr. Lerer: I want to X that out completely, because they were not involved in this case. There is a question involved as to whether he was a foreman for them at the time, but it was subsequently determined that he was acting in his own capacity in partnership with another man.

The Court: You want to strike that, from line 16 of page 2, the words, "and beds"?

Mr. Lerer: Yes, your Honor. And also——

The Court: To strike on line 2 over on page 2, line 10, the words "Scrap Metal Company of San Francisco?"

Mr. Lerer: And in place thereof, "plaintiff".

The Court: And insert in lieu thereof "plaintiff". The word "San Francisco", however, is on line 16.

Mr. Lerer: Yes, that would be deleted too, your Honor.

The Court: Yes.

Mr. Lerer: And then where it says, "employees of said Scrap and Metal Company were to"; that also is to be deleted.

The Court: All right, let's see. To be exact, that is, on line 16 of page 2, starting with the words, "the employees".

Mr. Lerer: Yes. [8]

The Court: And continuing on to line 17, the words, "of said Scrap Metal Company."

Mr. Lerer: Were to.

The Court: "Were to."

Mr. Lerer: That is to be deleted, and in place thereof,—

The Court: Insert—?

Mr. Lerer: —the word "plaintiff".

The Court: "Whereby plaintiff—"

Mr. Lerer: "Could enter."

The Court: "Could enter." The words "plaintiff could" to be inserted in lieu thereof.

Mr. Lerer: And on line 18, to delete, "and beds".

The Court: Well, we have already done that.

Mr. Lerer: Oh, yes, that's right. I am sorry. And on line 19, to add, "and at all times herein mentioned plaintiff was an invitee of defendant."

The Court: All right.

Mr. Lerer: Paragraph 5, Your Honor, we will respectfully request that the entire paragraph be deleted, because it adds nothing, because the Scrap Metal Company of San Francisco are not involved.

The Court: Yes.

Mr. Lerer: And paragraph 8 of page 3, line 6, line 7, rather: "in the capacity of foreman of Scrap and Metal Company of San Francisco"—we ask that be deleted. [9]

The Court: Anything inserted in lieu thereof?

Mr. Lerer: "As an invitee was on the premises of said Marine Hospital."

The Court: "As an invitee"?

Mr. Lerer: Yes. And then on line 9, to exclude, "and beds" again.

The Court: All right.

Mr. Lerer: Paragraph 14, on page 4, we have the change, "the loss of earnings," because of that misunderstanding of the employment, your Honor, and on line 22 to delete "employed as the foreman of the Scrap and Metal Company of San Francisco and", to delete all that.

The Court: Yes.

Mr. Lerer: And show that he was just earning \$400 a month. And then on line 25, instead of, "since that time", I would put "for one month." Then on line 27, where it says, "dollars wanted", to put a period there, and the remainder of line 27, 28, 29 and 30 to be deleted.

The Court: Starting with the words "per month" on line 27?

Mr. Lerer: Yes, your Honor.

The Court: To and including the word, "the time" at the end of line 30, to be deleted?

Mr. Lerer: Yes, your Honor.

The Court: Is that the extent of your motion?

Mr. Lerer: Yes, your Honor. [10]

The Court: Is there any objection?

Mr. O'Gara: We object to the amendment at this time on the ground it is untimely, Your Honor. There were depositions taken in this case, or a deposition of the plaintiff was taken by the defendant on March 14, 1950, and no filing was made subsequent. This is the first indication we have had of an amendment to the complaint in the respects that are offered. As I understand the amendments,

they are intended to make the complaint conform to what may be the proof.

The Court: Yes.

Mr. O'Gara: At the same time, the amendments present an entirely different theory to the legal status of this individual at the time that he was there.

The Court: That is a question I desire to ask you.

Mr. Lerer: Not at all. First of all, the deposition was taken, and counsel is not taken by surprise. If I at this time had presented by these amendments, your Honor, a new theory of law, why, counsel would be taken by surprise since he didn't—

The Court: Well, let me cut this a little short, because I think I see the problem here and I want to ask Mr. O'Gara this question. Wouldn't this plaintiff have been an invitee had he been an employee of the Scrap and Metal Company of San Francisco, which had authority to go there and be on the premises? Wouldn't he be a business invitee as an employee of that company? [11]

Mr. O'Gara: The theory of the government is that he would not be.

The Court: The theory of the government is that he is not an invitee now?

Mr. O'Gara: Or at any time.

The Court: Or at any time. However, referring specifically now to the amendment, the amendment does not change his position in law; it merely changes the factual situation as to whether he was



there as an invitee himself or as an invitee as an employee of the Scrap Metal Company.

Mr. O'Gara: Well, your Honor, the amendment changes his position to the extent that there is an attempt to make him a contractor with the government, and if he had been there as an employee of the Scrap Metal Company, which was for purposes of this argument, we may concede, a contracting party with the government, we have a different situation that if we at this time attempt to come within the terms, or if he attempts to come within the terms of the contract which the government had with the Scrap Metal Company, as though he were one of the contracting parties.

Mr. Lerer: No difference.

The Court: There is no difference in theory, no, Mr. Lerer. I understand.

Mr. Lerer: The deposition was taken, counsel knew exactly what it was several months ago. There is no obligation [12] upon the part of an individual to amend any period of time before. You can amend at the time of the trial. It is a perfunctory thing that is done every day.

Mr. O'Gara: Within the discretion of the court.

Mr. Lerer: That is true.

The Court: That is true.

Mr. Lerer: That is true.

The Court: And the only point that the Court is concerned with is whether or not it places the defendant in a position of being surprised with a new theory. Now you may have a different interpretation of the facts in the situation, but I don't

think any new theory has been here presented, and if a new theory had been presented or new facts had been developed and you desired additional time to prepare for the matter, then you could make a request for additional time.

Mr. Lerer: No objection at all, your Honor.

The Court: Secondly, might I not pose this question to you, Mr. O'Gara: If the facts develop under the pleadings here, wouldn't a motion in the nature of an amendment to have the pleadings conform to the proof be an order to do the very same thing he is trying to do now?

Mr. O'Gara: That is correct, your Honor; there isn't any doubt about that. We are ready to proceed.

The Court: Therefore I am going to grant the motion to amend, and if you desire additional time to prepare for this [13] matter, I will hear your request on that matter at this time.

Mr. O'Gara: No, your Honor, I think we may proceed.

The Court: All right, then the motion will be granted and the complaint is amended as has been indicated by the discussion here.

\* \* \* \* \*

### GERALD J. TRUBOW

called on his own behalf, sworn.

#### Direct Examination

Mr. Lerer: Q. Mr. Trubow, you are the plaintiff in this case, are you not? A. Yes, sir.

Q. And you reside in San Francisco?

(Testimony of Gerald J. Trubow.)

A. Yes, sir.

Q. Married and have a child?

A. Two children.

Q. Two children. Calling your attention to the 22nd day of April, 1949, did you have a business or occupation?

A. I was on commission with the Bercovich Scrap and Metal Company at that particular time. It was just previous to that that I went off salary, when the market took a drop, and I was [14] able to work with any individual that was coming into the yard, to go on outside calls. I had the authority of the company.

Q. But prior to that time you were employed as foreman of the yard of M. Bercovich and Company? A. That's right.

The Court: How do you spell that?

Mr. Lerer: B-e-r-c-o-v-i-c-h.

Q. Prior to that time you were a foreman and acting and receiving a salary?

A. That's right.

Q. As I understand, they have changed over to a commission? A. Right.

A. And on the 22nd day of April, 1949, you were still there at the yard doing substantially the same work, but on a commission? A. That's right.

Q. Is that correct? Now, did you have occasion, with a man by the name of Louis Steinberg to bid and have that bid accepted, of certain refrigerators at the Marine Hospital at 14th and Lake in San Francisco? A. Yes, I did.

(Testimony of Gerald J. Trubow.)

Q. Would you tell the circumstances surrounding the bid?

A. Well, Mr. Louis Steinberg was in business for himself, and when I went on commission, he came up to me and asked me [15] if I would go in together with him on the bid at the Marine Hospital. The reason the bid was put in under his name was that he was doing business as——

Mr. O'Gara: I object to any reason.

Mr. Lerer: All right. Very well.

Q. Well then, we will put it this way, that you had a bid for the purchase of certain refrigerators and that—the bid had been accepted, is that right?

A. That's right.

Q. How many refrigerators were there?

A. If I remember correctly, either two or three.

Q. Do you remember what you were to pay for these refrigerators?      A. Offhand, no.

Q. Was the money paid?

A. Yes, it was paid up on deposit.

Q. At the time of the bid?      A. Yes.

Mr. O'Gara: Your Honor, at this point I would ask that the bid itself, or a copy of the bid, be produced; that would be the best evidence.

The Witness: A copy of the bid is at the Marine Hospital in the hands of the purchasing department. They have a copy and Mr. Steinberg has a copy.

Mr. Lerer: Q. Do you know where the—strike that. [16] Do you know the whereabouts of Mr. Steinberg?

(Testimony of Gerald J. Trubow.)

A. I understand he is in Honolulu.

Q. You don't have access to the written bid itself?  
A. No, I don't.

Q. Did you or do you know of your own knowledge that the written bid was submitted and accepted by the Marine Hospital?  
A. Right.

Q. And in pursuance to that bid, you were told to come out and pick up the refrigerators?

A. I was given the slip that was sent to Mr. Steinberg, to go to the Marine Hospital and pick up the refrigerators.

Q. That slip is in whose possession now?

A. I think in the purchasing department of the Marine Hospital. I don't know if there was more than one.

Mr. Lerer: Counsel, would you have those slips with you at all?

Mr. O'Gara: I will see whether we have a copy. I have a photostatic copy of the bid and acceptance, which I think is the document that he refers to (producing).

Mr. Lerer: Q. I show you what purports to be an invitation bid and acceptance and ask you if you can identify that (handing to witness).

A. Yes, the refrigerators on the bottom.

Q. Well, does that look like the bid that was submitted under the name of Louis Steinberg, your partner in this deal, [17] for the purchase of these refrigerators?  
A. That's right.

Mr. Lerer: We will introduce as plaintiff's exhibit first in order, your Honor, this.

(Testimony of Gerald J. Trubow.)

The Court: It may be admitted into evidence as plaintiff's exhibit No. 1.

(Whereupon bid and acceptance for refrigerators, referred to above, was received in evidence and marked plaintiff's exhibit No. 1.)

Mr. O'Gara: Pardon me. May the clerk please staple the two pages of that plaintiff's exhibit No. 1 so that they may not become disconnected?

The Court: Are they both the same document?

Mr. O'Gara: Yes, they are. One is a continuation sheet, your Honor.

The Court: All right. Is there any objection to that?

Mr. Lerer: No, your Honor.

The Court: The two documents will be stapled together as plaintiff's exhibit No. 1.

Mr. Lerer: I presume there is no difference, although perhaps I had better—

The Court: Well, if they are both material to this matter, they can still be continued as one exhibit. I have no reason to want them to be identical. I just want to know that they are the same subject matter. [18]

Mr. Lerer: Yes.

The bid, as I understand on, on this exhibit No. 1, was for these refrigerators, electric, for 110 volt, 60 cycle, A.C. current; another one, one Grunow-Kelvinator model, household type, seven cubic foot capacity, serial No. SD-451375; and the third one, one Westinghouse household type, seven cubic foot

(Testimony of Gerald J. Trubow.)

capacity, serial No. 996016-5149384. Were those refrigerators those which were picked up on the 22nd of April, 1949?      A. That's right.

Q. Yes. Now you say that you received a slip of some sort which you took to the Marine Hospital, is that correct?

A. Well, I don't recall whether it was a slip or whether it was a copy or what they sent out when the bid was awarded. You would have to take that up to the purchasing department so you could get authority to pick up the merchandise.

Q. From whom did you get that paper?

A. I received it from Mr. Steinberg.

Q. You don't know where that was sent in the mail—whether that was sent to him by mail from the Marine Hospital, or—

The Court: If I remember correctly, he received it by mail.

Mr. Lerer: Yes.

Q. Do you recall what that slip said, or the substance of it?

A. All I recall was to pick up the refrigerators. What the [19] wording of the subject was, I don't recall.

Q. In other words, it directed you pick up the refrigerators and identify them?      A. That's right.

Q. Did you go to the Marine Hospital on the 22nd day of April, 1949?      A. I did.

Q. About what hour of the day?

A. It was after lunch.

Q. Well, approximately; do you recall?

(Testimony of Gerald J. Trubow.)

A. I would say around one or one thirty.

Q. Did you go with somebody else?

A. Yes, I did.

Q. The name of the man? A. Louis Rossi.

Q. What capacity did he go in?

A. He is a driver for M. Bercovich and Company.

Q. He drove the truck?

A. That's right.

The Court: What is this man's name again?

The Witness: Louis Rossi.

The Court: R-o-s-s-i?

The Witness: R-o-s-s-i.

Mr. Lerer: Q. When you entered the premises, where did you go, Mr. Trubow? [20]

A. We went down in the basement, if I recall, to where the storeroom is, first. When we drove the truck around the side of the hospital.

Q. Then what did you do?

A. I went inside with the driver and we asked the fellow in attendance there where we picked up the refrigerators and he asked if we had a copy of the paper I had in my hand, and I showed it to him. He took me upstairs to Mr. Lewis, who is the purchasing—in the purchasing department at the Marine Hospital.

Q. Where was that? Was that in the offices at the Marine—

A. In the offices. I think it was either on the first or second floor.

Q. Did you have a conversation with Mr. Lewis?



(Testimony of Gerald J. Trubow.)

A. Yes, I did.

Q. Do you know what capacity Mr. Lewis occupies at the Marine Hospital?

A. I understand he is the head of the purchasing department.

Q. Yes. Now what was the conversation that you had with him?

A. I showed him the copy of the bid that I had in my hand. He looked it over, got the copies that he had, and then we were talking about other bids that might come up, and then he said that we could go downstairs and pick the refrigerators up, and I think he signed the bid that I handed him; of that [21] I am not sure.

Q. Then what did you proceed to do?

A. I went back downstairs and the man that was starting to load the refrigerators up the stairs—he was told that there was a freight elevator over in the corridor that we could use.

Mr. O’Gara: I object to “he was told”.

Mr. Lerer: Well——

Mr. O’Gara: And I ask it go out.

The Court: That part may go out.

Mr. Lerer: Yes, that part might go out, your Honor.

Q. You then went downstairs, is that correct?

A. That’s right.

Q. Did you have occasion to—withdraw that. You were directed downstairs by Mr. Lewis?

A. That’s right.

Q. While you were going downstairs, did you

(Testimony of Gerald J. Trubow.)

have occasion to meet somebody before you go to the freight elevator?      A. Yes.

Q. Who did you meet?

A. The party that was in charge down in the storeroom.

Q. When you say in charge, you mean the man employed by the United States Government at the Marine Hospital?      A. That's right.

Q. Did you have a conversation with him? [22]

A. I don't recall if I had the conversation with him, but the topic of conversation at the time was that there was an elevator that we could use, so we wouldn't have to take them upstairs, up the stairs.

Mr. O'Gara: I will object to that, your Honor. He said he didn't recall, and yet he went on to say that there was a—related the topic of conversation.

Mr. Lerer: Yes, I think that is a valid objection, your Honor.

The Court: Well, the objection will be sustained as to the form. The only thing I see is, were you present while the conversation was had with somebody else?

The Witness: Yes, sir.

The Court: You heard it yourself?

The Witness: Yes.

The Court: All right, then you may proceed to question him.

Mr. Lerer: Q. Did you hear the conversation directly with their employee, or was the employee of the government talking to Mr. Rossi, do you recall?

(Testimony of Gerald J. Trubow.)

A. I would say he was talking to both of us.

Q. All right. What did the employee say? What did Mr. Rossi say and what did you say?

A. Mr. Rossi asked where the elevator was, and he told him it was around the corridor on the far end. [23]

Q. By "he" you mean whom?

A. The party that we were talking to, from the Marine Hospital.

Q. Yes. Now what did you say?

A. I said to my driver there, I says, "Well, they have an elevator. It is easier to take it than trying to get it up stairs."

Q. Yes. So the government employee directed you toward this elevator? A. That's right.

Q. Did he at that time tell you the type of elevator it was? A. No, sir.

Q. Was there anything said about the operation or control of this elevator? A. No, sir.

Q. Did Mr. Lewis, before you came down, inform you of the elevator, what type of elevator it was? A. No, he did not.

Q. Or the method of operation or control of the elevator? A. No.

Q. Then what did you do, if anything, after you had this conversation with this employee?

A. Mr. Rossi—I walked with Mr. Rossi, as he had the refrigerator on the handtruck, and he went into the elevator [24] and asked me to close the door, as he could not use the elevator, because he was holding the handtruck with the refrigerator.

(Testimony of Gerald J. Trubow.)

Q. Yes. Do you know how big this elevator was?

A. I would say it was a little larger than the average elevator that we handle freight on.

Q. You don't know the dimensions, or——

A. Not offhand, no.

Q. I see.

The Court: Have those photographs been identified?

Mr. Lerer: Not yet, your Honor.

The Court: Would you have them marked for identification so we will know about them, know what we are talking about, in the order in which you desire to have them marked?

Mr. Lerer: Yes, your Honor. We will introduce these photographs for the purpose of identification.

The Court: Just in the order, and the clerk will just mark them for identification. Then you can question the witness about them.

Mr. Lerer: All right.

The Court: We will identify them later as to what they show.

Mr. Lerer: Very well. Ask they be marked as plaintiff's 2, 3 and 4, your Honor.

The Court: Very well. [25]

The Clerk: Exhibits 2, 3 and 4 for identification only.

(Whereupon photographs referred to were marked plaintiff's exhibits 2, 3 and 4 for identification.)

Mr. Lerer: I think I have turned these around

(Testimony of Gerald J. Trubow.)

a bit, your Honor. But we can identify them by number.

Mr. Lerer: Q. I show you plaintiff's 4 for identification, which purports to be a picture of an elevator, and ask you if you can identify that (handing to witness).

A. Yes, that is the elevator we went into.

Q. Is that a picture of the elevator in which you received certain injuries which we will go into later? A. Yes.

Q. Were you present at the time this photograph, identified as plaintiff's 4 for identification, was taken? A. Yes, sir.

Q. You were there at the time?

A. Yes, sir.

Mr. Lerer: We will introduce this as plaintiff's exhibit next in order, your Honor.

Mr. O'Gara: That will be plaintiff's—?

The Court: It may be introduced as plaintiff's exhibit 4. We will just keep them with the same number.

Mr. O'Gara: That is of the elevator—

The Court: We will digress from chronological numbering of the exhibits, because I know that the photographs will come [26] in later, anyway.

Mr. O'Gara: We have no objection to the introduction of that exhibit 4.

The Court: 4 for identification will be admitted.

(Whereupon plaintiff's exhibit No. 4 for identification was received in evidence.)

Mr. Lerer: Q. I show you a photograph which

(Testimony of Gerald J. Trubow.)

purports to be a picture of the elevator——

Mr. O'Gara: That is identified as what, counsel?

Mr. Lerer: Identified as plaintiff's 2.

Q. (Continuing)—and ask you if you can identify that particular photograph?

A. Yes, I can.

Q. Is that a picture of the elevator which you were present in on April 22, 1949, at which time you received certain injuries? A. Yes, sir.

Q. Were you present at the time that those photographs were taken? A. Yes, I was.

Mr. Lerer: Introduce this as plaintiff's No. 2, your Honor.

Mr. O'Gara: Well, we will object to this, your Honor. While there is some showing from the picture itself that there is an elevator represented on the picture, it is a picture of [27] the doors, the outside doors of the elevator or shaft, and not a picture of any door on the elevator or any part except a small portion between the two doors of the elevator. There has been no testimony as to what doors, and there are, as I understand it, more than one set.

The Court: Yes, I will overrule the objection at this time, and if the photographs aren't connected up, you can move to strike the photograph, plaintiff's exhibit 2 for identification, will be admitted into evidence as plaintiff's exhibit 2.

(Whereupon plaintiff's exhibit No. 2 for identification was received in evidence.)

(Testimony of Gerald J. Trubow.)

Mr. Lerer: Q. I show you a photograph which purports to be of the doors of an elevator and ask you if you can identify that photograph.

A. Yes, these are the doors of the elevator that we loaded the refrigerators on.

Q. Were you present at the time that this photograph was taken? I am referring to plaintiff's exhibit 3.

A. Yes, I was.

Mr. Lerer: We introduce this as plaintiff's exhibit No. 3, your Honor.

Mr. O'Gara: May the record show the same objection; no proper foundation?

The Court: Yes, the record will show it and the same [28] ruling will be made, and the photograph will be admitted into evidence as plaintiff's exhibit No. 3.

(Whereupon plaintiff's exhibit No. 3 for identification was received in evidence.)

Mr. Lerer: Q. Mr. Trubow, after having this conversation with this government employee, what did you then do, if anything?

A. You mean before we went to the elevator or after?

Q. Before you went to the elevator. I had you where you and Mr. Rossi were talking to this government employee in the basement.

A. Yes.

Q. Then he referred to this elevator, and what did you do after that?

A. Well, I went upstairs to clear the papers, to pick up the refrigerators, and then when I came

(Testimony of Gerald J. Trubow.)

back downstairs they were already over by the elevator.

Q. By "they" you mean whom?

A. Mr. Rossi and this government man that took him over there.

Q. Did you walk over to the elevator?

A. I was by the elevator, and then when it was loaded, I walked on.

Q. When you came to the elevator, what was the position of the doors?

A. They were—the elevator was wide open. [29]

Q. I show you plaintiff's 4 and ask if these were the positions, or rather, if that was the position of the door at the time that you first stepped on the elevator.

A. No, it was not.

Q. Well, what was the position of the door?

A. The position of the door of the elevator was open. In other words, there was no doors or anything showing on the elevator when I walked on.

Q. Well, if this grilled door was lifted, would it then show the position of the doors at the first time that you entered upon the elevator?

A. Yes.

The Court: May I see that photograph? (Examining.)

Mr. Lerer: Q. So then as I take it, the bottom door was flush open, flush up to the top, and the lower door was flush down to the bottom?

A. That's right.

Q. When I say that, did you know at that time that the door was divided in half, that there was a bottom and an upper part?



(Testimony of Gerald J. Trubow.)

A. No, I did not.

Q. But as you walked on, you say that there was no part of any door showing?

A. That's right.

Q. With the exception, as I take it, from this photograph, of this handle on the very top? [30]

A. That's right.

Q. You stepped into the elevator and what happened, if anything, after that?

A. Mr. Rossi asked me to close the elevator door as he could not reach it on account of holding the handtruck with the refrigerator. Which I proceeded to do.

Q. How did you do that?

A. I looked up, put my hand up on the handle and came right straight down.

Q. Now I show you plaintiff's 3, and I ask you if that properly identifies the way that you reached out and grabbed the handle?

A. That is the way I grabbed the handle, except it was higher up at the time.

Q. Well, how high up was it at the time that you reached?

A. It was right up to the top.

Q. Yes.

The Court: May I see the photograph?

Mr. Lerer: Yes, your Honor (handing to Court).

Q. As you pulled the handle down, what occurred, if anything?

A. The next thing, my hand was caught in between the two doors.

(Testimony of Gerald J. Trubow.)

Q. Did you see the lower door coming up?

A. No, I did not.

Q. How much of an effort did you expend in pulling the upper [31] door down?

A. I came down with my full force.

Q. Did you notice the construction of this door?

A. No, I did not.

Q. But you believed it was necessary——

A. To pull down like the average elevator.

Q. Now previous to you putting your hand out to grab the handle and pull it down, did you see any other way of pulling that door down?

A. No, sir.

Q. Did you, subsequent to your injury, find out that there was another way of pulling the door open?      A. You mean that elevator door?

Q. Yes.      A. No, sir.

Q. Now after you came back to take those pictures, did you have occasion to look on the inside of the door?

A. I didn't, but the man that took the picture was looking around and he spotted this little piece of leather strap that—it was broken off on the inside. That was the first time I saw anything else.

Q. That is the first time you had occasion to see anything on the inside concerning a strap?

A. That's right.

Q. How long was that strap? [32]

A. Roughly around a half inch. It was riveted or bolted to the metal part of the door.

Q. Was there any sort of metal of any kind that

(Testimony of Gerald J. Trubow.)

surrounded the strap? A. I would say no.

Q. There was just a little piece of dark strap, would you say? A. That's right.

Q. Just a half inch protruding, or a half inch down? A. Roughly.

Q. Do you recall how far from the lower part of the elevator that strap was?

A. I would say roughly two or three inches above where the part of the handle was, or in the inner part of the door.

Q. More specifically, referring to plaintiff's 2, would you say where this——?

A. No, I would say in the center of the door, up in this portion, on the inside (indicating).

Q. Yes, the center part up there?

A. Yes.

Mr. Lerer: The center part up there (indicating), a half inch, your Honor. (Handing to Court.)

The Court: The witness is referring to the——

Mr. Lerer: The lower part of the center part of the upper door. [33]

Mr. O'Gara: In what exhibit, your Honor.

The Court: In plaintiff's exhibit 2.

Mr. O'Gara: As I understand the testimony of this witness, he refers, however, to the inside.

The Court: Yes, the inside. It would be the inside of the elevator.

The Witness: If I remember correctly, yes, your Honor.

Mr. Lerer: Q. You saw nothing on the outside

(Testimony of Gerald J. Trubow.)

of the elevator that showed there was a rope or had been a rope, to the best of your knowledge?

A. No, sir.

Q. Now on plaintiff's 4 there is a grilled door. Now that had nothing to do with the accident, is that correct?

A. No, sir.

Q. Just for the purpose of clarification, when you refer to a door, you mean this particular door referred to in plaintiff's 2, in which you have your hand on the handle, is that correct?

A. Yes, sir.

Q. Now what was the condition of the lighting on the inside of the elevator at the time that the accident occurred?

A. If I recall, there was no light in the elevator. The only lighting was a light in the corridor of the hospital, where the elevator is, and where that light was, I do not know. [34]

Q. You don't know how far away from the elevator the light was in the corridor?

A. Exactly, no, sir.

Q. But there was no light in the elevator at all?

A. I don't recall there was any light.

Q. And what would you say as to the general lightness or darkness of the condition inside the elevator?

A. Oh, there was enough reflection from the light of the corridor to see what you were doing in the elevator.

Q. What do you mean, see what you were doing?

A. Well, you were able to walk in without being in a total darkness, or to bump into anything.

(Testimony of Gerald J. Trubow.)

There was enough light to see where you had to go.

Q. Yes, but was there—was that all the light that was there at that time?      A. That's right.

Q. I take it you couldn't have read a newspaper in there?      A. I don't think so.

Q. What happened after you pulled the handle down, Mr. Trubow?

A. I let out a yell. It happened so fast. Then I started up to the purchasing department to find out if I could go to a doctor.

Q. Well, let's—before you get there—

A. I pulled down, and the next thing I knew, my hand was [35] caught between the two doors.

Q. Then you went upstairs?

A. Then I started upstairs, and on my way up, Mr. Lewis was walking down and I stopped him on the stairs and told him what happened and asked him if he would take me over to the doctor, which he proceeded to do. And I went to the doctor and he looked at my hand, and it was swelling up, and he told me he thought I had a bad bruise and I should go home and soak it in epsom salts. Then I left and that was all. I got back in the truck with the driver and we were on our way back to the yard. [36]

\* \* \* \* \*

#### Cross Examination

By Mr. O'Gara:

Q. Let's go back and go over this in an orderly way. You went to Mr. Lewis, the supply officer. Mr. Lewis told you nothing about the elevator?

A. That's right.

(Testimony of Gerald J. Trubow.)

Q. Then you went downstairs to the storekeeper from Mr. Lewis' office?

A. I went back downstairs, yes, sir.

Q. Now the first person connected with the Marine Hospital you saw on the day you went out for these refrigerators was the man who sent you to Mr. Lewis? [64]

A. The first person, yes.

Q. That man said nothing to you about the elevator, is that right?

A. That I do not recall, whether it was that man or someone else.

Q. Now at that time, the time that this man sent you to Mr. Lewis, did that man say anything to you about the elevator?

A. I don't think so. I don't recall.

Q. Well, isn't it correct that he sent you to Mr. Lewis with your slip of paper?

A. Yes, that's right.

Q. All right. After you went and saw Mr. Lewis, you then went downstairs again to the storekeeper again, is that correct?

A. I went down to where I originally was, that's correct.

Q. That was near the entrance to which you came with the truck?

A. That's right.

Q. Do you know whether that was the north, south, east or west side of the hospital?

A. No, I do not. All I know, it was on the side of the hospital.

Q. All right. Now when you came down near the entrance to which you had brought the truck, at

(Testimony of Gerald J. Trubow.)

that point did you see anyone connected with the hospital or anyone who in your [65] opinion was connected with the Marine Hospital?

A. Whoever directed us to where the refrigerators were.

Q. All right. Now when and where did you first hear about the elevator?

A. When he started to load up.

Q. Wait. When you say "he"—

A. When Mr. Rossi started to load it upstairs.

Q. Was that after you had seen Mr. Lewis?

A. When I went upstairs to see Mr. Lewis, he proceeded to get the refrigerators. He was told by this party where they were.

Q. But at that point he was not told anything about the elevator or in your presence—

A. Not right at that point.

Q. All right. A. Not that I know of.

Q. All right. Then you came down from Mr. Lewis' office and you saw someone in the storekeeper's room?

A. Well, he wasn't in the storekeeper's room. He was in the corridor talking to us, in the hallway.

Q. But between the entrance where you had your truck and where the storekeeper's office was, is that correct? A. That's right.

Q. At that time was said, what exactly was the conversation?

A. He told us that we didn't have to—

Q. Wait. "He" told who? [66]

A. Mr. Rossi and myself.

(Testimony of Gerald J. Trubow.)

Q. Well, you were both there?

A. I was standing there then. That is when I came back from Mr. Lewis' office.

Q. All right.

A. And he told him that he did not have to take them upstairs.

Q. Which stairways did he refer to?

A. The stairs that come right in off the side of the hospital. There is either three or four stairs with the rail on the side.

Q. And that was on the side away from the elevator side?

A. Yes.

Q. The south side of the hospital?

A. Well, I don't recall what side of the hospital.

Q. But it was on the storeroom side, the storekeeper's office?

A. I would say it was the storekeeper's side, yes.

Q. Well, if we said that that was on the south side, or the elevator was on the north side, that would put it on the south side?

A. All I know is, it is the stairs you have to take to go down into the corridor from this side of the hospital. Now if it was the south or the north, I could not recall.

Q. That stairway came out nearest to the storekeeper's office?

A. If that is what they call the storekeeper's office, sir, [67] I would say yes.

Q. If at that time Mr. Rossi was present with you—at that time this individual told you what?



(Testimony of Gerald J. Trubow.)

A. That we did not have to take them upstairs, that there was a freight elevator.

Q. Tell us exactly what his language was. What did he say?

A. I am repeating what I recall that he said, that we did not have to take them up the stairs, that there was a freight elevator.

Q. Did he say anything else?

A. I do not recall.

Q. Did you ask him to use the elevator?

A. No, he told us we could. We did not ask.

Q. Did he say that you were to use the elevator or that you could use the elevator?

A. He said that we could use the elevator and would not have to pull them up the stairs.

Q. Now you say you went back to the hospital the day after the accident to take pictures?

A. No, I did not say that. I am sorry.

Q. When did you go back to the hospital with the man who took the pictures?

A. I misunderstood you. I thought you meant X-rays. I went back the following day to take pictures of the elevator, that's correct. [68]

Q. Who is the person you went with to take the pictures? A. Mr. Jess Lieberman.

Q. Where does Mr.—is that L-i-e-b-e-r-m-a-n?

A. Yes.

Q. Where does he have his studio?

A. He has no studio.

Q. Where does he have——

A. He lives on 38th Avenue.

(Testimony of Gerald J. Trubow.)

Q. Is he a professional photographer?

A. No, he is not.

Q. A friend of yours?           A. Yes, he is.

Q. This was the day after the alleged injury took place?

A. If I recall correctly, the day after or maybe the following day. No, I wouldn't say if it was one or two days.

Q. Within the same week?       A. That's right.

Q. All right. At the time that Mr. Lieberman was there, did Mr. Lieberman take any pictures besides the pictures that have been shown here in court?

A. All he took was those pictures of the elevator, with Mr. Lewis present.

Q. Didn't Mr. Lieberman take a picture of the inside of the door?

A. The pictures he took are the pictures you have as an exhibit. [69]

Q. Well, Mr. Lieberman, according to your testimony, indicated something about the inside of the elevator.

A. I said when he looked around, when he looked in there, was when he noticed that strap was not in the door. It was broken off.

Q. You say he noticed. Did he tell you that or did he show you that?

A. We both looked at it.

Q. And you saw it?

A. That's right. It was pointed out to me.

Q. There was no picture taken of it?

(Testimony of Gerald J. Trubow.)

A. You couldn't take a picture of that inside; rather, we didn't bother to take an inside view of the back end of the elevator. We just the view of the elevator doors.

Q. Well, at any time, isn't it a fact, Mr. Trubow, that these pictures, 2, 3 and 4, were taken with lighting equipment brought by Mr. Lieberman?

A. I don't know if he had lighting equipment or not, to tell you the truth. I don't know what kind of a camera he uses.

Q. Don't you recall a flashbulb exposure?

A. Well, the flash on his camera.

Q. Yes?

A. I think so, if I recall correctly.

Q. In what condition, what did the physical condition of the elevator constitute which prevented you from taking the picture [70] of the inside of the door of the elevator?

A. Because I had never asked him to take one of the inside.

Q. But you have stated that you saw on the inside of the door what appeared to be a broken strap?

A. That's right.

Q. And no picture was taken of that?

A. I don't recall. No, sir.

Q. There is no picture here.

A. There wasn't any taken.

Q. It is your testimony that these are all the pictures that were taken?

A. That's right.

Q. Going back to your conversation with the individual who said that you could use the elevator,

(Testimony of Gerald J. Trubow.)

it wasn't necessary to use the stairs; at that time did you know where the elevator was located?

A. No, I did not.

Q. Who showed you where the elevator was located?

A. The party, whoever he was, that took us over to the elevator.

Q. You came back, according to your testimony, within one or two days to take these pictures?

A. That's right.

Q. Now at that time did you go to the office of the storekeeper? [71]

A. No, I did not. I wasn't—I went to the office of Mr. Lewis and asked if I could have permission to go downstairs and take pictures.

Q. At that time did you go into the basement to take the pictures?

A. We went to the elevator, yes.

Q. Did you ride in the elevator?

A. No, we did not.

Q. Do you recall whether or not these pictures, Exhibits 2 and 3, represent the basement floor, the first floor or the second floor?

A. That represents the basement floor.

Q. Both these pictures? A. Yes.

Q. You are positive of that?

A. Definitely.

Q. Recalling the time that you took the pictures, did you not go to the office of the storekeeper to locate the individual who had told you to use—told you that you might use or could use the elevator?

(Testimony of Gerald J. Trubow.)

A. Would you repeat your question, please?

Q. At the time that you took these pictures, did you not go to the storekeeper's office?

A. I don't think I did.

Q. Did you make any endeavor subsequent to the time of the [72] injury which is alleged to have occurred in the elevator? Or did you make any effort to locate the individual who you say said you could use the elevator?

A. No, I did not.

Q. Could you identify that individual?

A. No, I could not.

Q. Does the man sitting there in the first row (indicating)—

A. I couldn't tell you that. It has been over a year since the accident happened.

Q. Have you ever seen that man before?

A. No, I haven't. As far as a personal individual is concerned.

Q. In connection with the elevator or the use of it, you say that there was no light in the elevator. Showing you Exhibit 4; that is a picture taken from the floor side of the elevator, is that correct?

A. That's right.

Q. And on the base—

The Court: You mean by that, the outside?

Mr. O'Gara: The outside looking into the car.

The Witness: That's right.

Mr. O'Gara: Q. You will observe the ceiling of the car?

A. Yes.

Q. Do you recall having observed in the photo-

(Testimony of Gerald J. Trubow.)

graph what the ceiling of the elevator or car was, what it consisted of, how [73] it was made?

A. No, I did not.

Q. Well, isn't it a fact, Mr. Trubow, that the ceiling of the car was just as the mesh gate, a wire caning construction?

A. I could not tell you.

Q. Isn't it a further fact, Mr. Trubow, that the ceiling of this elevator car admitted north light from the windows and the door of the floor above, so that the shaft of the elevator, the elevator shaft and the elevator car, were indeed light, but without artificial illumination?

A. That I do not recall, but from my past experience, going into elevators, when you go from one floor to another, you have a blank wall on the back end.

Q. Well, isn't it a fact that when you took these refrigerators out of the car, you took them out at the entrance which is the driveway behind the hospital on the north side and that in that——

A. That was on a different floor, they were taken out.

Q. The floor above the basement?

A. If that was the floor; wherever the loading platform was.

Q. The loading platform is on the north side of the hospital, that is, when you entered, looking at picture 4, when you entered with the refrigerators from the outside as shown in this picture; the refrigerators were wheeled through the cars?

(Testimony of Gerald J. Trubow.)

A. Right; straight. [74]

Q. Right straight through? A. Yes, sir.

Q. They were wheeled through on the next floor above?

A. Going right straight out the same way.

Q. Yes? A. That's right.

Q. And when they were wheeled through, they were wheeled through doors that opened up like garage doors? They were unlike this door, they were not like this door showing in the picture?

A. I wasn't there when the refrigerators were moved. I was on my way to the doctor.

Q. Well, it was your testimony this morning that you had no difficulty seeing the inside of the car.

A. That was when it was down in the basement.

Q. You could see everything in the car itself?

A. I said the car wasn't dark, where you couldn't see where you were going.

Q. And you don't recall whether or not the reason was because the illumination provided by those north windows above shed light down the shaft?

A. No.

Q. When you turned around to operate this door, Mr. Trubow, isn't it a fact that you had to put your hand out and underneath the top door to grab the handle which is on the outside [75] of the door? Isn't that correct?

A. Yes, I put my hand in an upright position (indicating).

Q. And that was almost your full height?

(Testimony of Gerald J. Trubow.)

A. My full height, that's right.

Q. But it was underneath the door?

A. Well, as the picture shows, the handle is coming down and I put my hand on the handle.

The Court: I think you are both referring to the same thing, but in a little different language. As I take it, the handle is on the outside of the door and you have to reach on the outside?

The Witness: It comes right down and I just reached over and got a hold of the handle and reached and pulled straight down.

The Court: The witness is indicating by putting his right hand up and palm down.

Mr. O'Gara: Q. You were standing there, and your palm, Mr. Trubow, had been turned towards you? A. Not necessarily.

Q. Well, look at the handle as exhibited in the picture Exhibit No. 4 and see if that doesn't indicate that.

A. If you will look at Exhibit 2, you can see also, your hand can be put the opposite way.

Q. Well, that, of course, is when the door is down?

A. That is when the door also is raised, straight up. I [76] mean, the handle is hanging from the door.

Q. At any rate, you had to put your hand underneath this edge of the door?

A. I would say not, because the handle was hanging far enough down that where the door was flush, that the handle wasn't.



(Testimony of Gerald J. Trubow.)

**The Court:** Well, your hand was still underneath the door?

A. Well, it was on the handle which was protruding down from the door. My hand wasn't underneath any slot of the door, if that is what the counsellor means.

**The Court:** No, but let's put it this way. You had to pass your hand underneath that door to get it on to the handle, isn't that correct?

**The Witness:** Well, maybe I'm a little bit—. But I would say when the handle was coming down, when there is a leeway where you come to.

**The Court:** I understand that.

**The Witness:** Your hand is not underneath the slot of the door.

**The Court:** The angle is different when you are reaching high.

**The Witness:** I just reached straight up, got hold of the handle and come right straight down (indicating). I didn't have to reach into any slot. The handle was protruding enough for my hand to reach it.

**Mr. O'Gara:** Showing you plaintiff's exhibit No. 2, you [77] see what appears to be a hand, and then that handle?      A. That's right.

**Q.** Is that your hand?

A. That's right, it is.

**Q.** It appears to be bandaged, is that correct?

A. Yes, it is. That was the following morning, if I—I presume, after I got hurt, or the next day, one of the two.

(Testimony of Gerald J. Trubow.)

Q. And this exhibit No. 2; is it your testimony that that represents the manner in which you operated that?      A. That's right.

Q. With your hand underneath this bottom edge of the door?

A. Well, that was holding the door as we came down halfway to take a picture, showing how the doors came down. My hand was holding the handle when I pulled the elevator. But that was just to show the doors coming, one up and one down.

The Court: Well now, when your hand was struck, as you have testified, didn't you have your hand underneath this edge?

The Witness: That I do not recall. It happened so fast I couldn't tell you which way my hand was.

Mr. O'Gara: Q. And where was your hand with relation to the handle?

A. My hand was in the handle.

Q. Struck in the handle, is that correct?

A. Yes. As I came down, the door met right across my fingers.

Q. All right. Now when you entered this elevator, were the [78] refrigerators already loaded in?

A. This one refrigerator that he had on the hand truck was.

Q. When you entered the elevator, did you observe the open elevator at the top and bottom?

A. No, when I entered the elevator it was just an open hole. In other words, there was just an opening for me to walk in.

Q. When you entered the elevator, when you

(Testimony of Gerald J. Trubow.)

were once in the elevator, did you turn around and look at the top and the bottom?

A. I did not look at the top and bottom. Mr. Rossi asked me to close the door as I entered. I turned around, put my hand up and came down with the door.

Q. What did Mr. Rossi say to you about the door?

A. He never said anything to me about the door.

Q. Do you know who opened the doors before the refrigerators were put in?

A. That I do not know.

Q. Did you ask Mr. Rossi who opened the doors?

A. No, I did not.

Q. Did you ask Mr. Rossi if he had ever operated that elevator before?

A. Mr. Rossi was never out there to operate that elevator before.

Q. Did you ask him?           A. No, I did not.

Q. Did you ask anybody in the hospital about the operation of the elevator?

A. No, we were told that we could use the freight elevator.

Q. Well, you were told, as you have testified——

A. That's right.

Q. ——that you might?       A. Yes.

Q. But you were not told, if I understand you correctly, that this elevator should be operated one way or another?

A. Well, most elevators I have been into will

(Testimony of Gerald J. Trubow.)

have a sign saying, if they don't want anyone to operate it, that you do not operate this elevator without the party on duty. But there was no signs or anything that we noticed to tell us that.

Q. But did you determine from Mr. Rossi or from anyone anything at all about the operation of this elevator before you operated it?

A. No, I did not.

Q. Have you ever seen that kind of elevator before?      A. No, I haven't.

Q. Had you ever been in a building where there were doors meeting in the middle?

A. I might have been in the building, but I was never in an elevator of that type.

Q. Well, your business, in the business that you are engaged in as a scrap metal dealer and on commission, didn't you pick [80] up scrap metal in industrial plants?      A. Yes.

Q. Didn't you use freight elevators?

A. Yes.

Q. What kind of elevators did you use?

A. Well, the average elevator was a street elevator.

Q. Well, the average freight elevator; what kind of freight elevators?

A. I explained that the average freight elevator we used in most of the cases are what they call street elevators.

The Court: That is the kind that comes up to the sidewalk?

The Witness: That's right.

(Testimony of Gerald J. Trubow.)

Mr. O'Gara: What about the average freight elevator that was on the inside, an inside elevator, not a street elevator? What about the average one you used in that connection?

A. Well, the inside elevators usually are operated by someone in the building, and if we have to pick merchandise up in the building, we are taken down in the elevator by an elevator operator.

Q. So when you came to this elevator, you had never before, according to your testimony, used this kind of elevator before, is that right?

A. That's right.

Q. Nevertheless, you put your hand through and under the door? [81]

A. I put my hand in the handle, not under the door.

Q. Did you look for a handle on the inside?

A. When I looked up to close the door, the only thing that came to my eye was this brass handle that shows in the picture.

Q. Well, where were you standing when you——

A. Right in the center of the elevator.

Q. Were you standing in the center of the car floor, or were you standing in the space just between the car doors?

A. I was standing in the elevator right in the center, my back was to the——

The Court: You mean in the center of the doorway?

The Witness: That's right. In other words, walking in the elevator, I was standing right in it, right

(Testimony of Gerald J. Trubow.)

in the center and the handle was right about my hand.

The Court: You don't mean you were standing in the center then?

The Witness: On the elevator. In other words, when I walked in, the refrigerators was already in with the driver, and I walked in and he asked me to close the door. I turned around,—

The Court: The refrigerator took up most of the elevator space, didn't it?

The Witness: There was room on both sides, and there was also room for a party to stand in front. That is where I was standing. But— [82]

The Court: But when you say the center, you mean equi-distant from the sides of the door, not from the front of the elevator to the back?

A. No. The center from the sides of the door of the elevator.

Mr. O'Gara: May this be marked for identification?

The Court: It may be marked, Mr. Clerk, as defendant's exhibit A.

(Whereupon photograph referred to above was marked defendant's exhibit A for identification.)

Mr. O'Gara: Q. Now when you looked up to get the handle, did you observe the door?

A. No, I did not.

Q. You didn't look at the handle, you didn't look at the door to which the handle was attached?

(Testimony of Gerald J. Trubow.)

A. No, all I did was looked up, saw the handle, put my hand on it and came down. That is from experience of pulling a door down in an elevator. You just take whatever there is to grab and you come down with it. If there is a strap, normally you take the strap. If there is a handle, you take the handle.

Q. But according to your testimony, you had never been in this kind of elevator before?

A. But most of them, there are a lot of elevators that have above-doors that are not this type of a door. It is just a plain wooden door that comes down.

Q. But this was not a plain wooden door. You saw that. [83]

A. I did not see anything.

Q. Well, did you not see, showing you plaintiff's exhibit No. 2, that there was a metal edge on the bottom part?

A. I did not look. All I did was to close the door when he asked me. That was when I first walked into the elevator.

Q. And you pulled that door down; did you notice then the way the door——

A. That, yes. That's why I came down with my full force. I closed, I came down before I knew anything about my hand being in there.

Q. Now showing you government's exhibit A for identification, will you please examine it?

A. I would say——

Q. Have you examined it?

A. I am looking at it, yes.

(Testimony of Gerald J. Trubow.)

Q. On the basis of that examination, have you any refreshed recollection of what you saw when you looked for the handle of the door?

Mr. Lerer: Let's get that into evidence, counsel, if you want, before you examine him on it. If that is the inside of the elevator, will you introduce it in evidence and then——

Mr. O'Gara: Yes. If there is no objection by counsel.

Mr. Lerer: Well, would you ask him if that does look like the inside? I don't know.

The Witness: You mean the opposite side of the elevator? [84]

Mr. O'Gara: The inside of the car looking out.

A. I couldn't say, because when I came on the elevator, the man with the refrigerator was already, the driver already had the refrigerator on the hand-truck and I did not see the inside of the elevator.

The Court: You saw it next day when you took the photograph, didn't you?

The Witness: Yes, but I didn't look in the back end at all. I just went there to take pictures of the door, how my hand got caught.

Mr. O'Gara: Q. When you went with Mr. Lieberman to take pictures, is it not true that you observed the back side of the door?

A. Now which do you call the backside, the side door going out as we were unloading, or the back of the door?

Q. When you were on the inside of the car looking toward the hospital?           A. Yes?



(Testimony of Gerald J. Trubow.)

Q. Did you not look at the back of the door, the door which you grabbed?

A. Yes, I did. I did look at that. He looked at it, and he pointed out to me about the strap. That is the first time I saw the doors of the elevator.

Mr. Lerer: Just to save time, if you tell me you know of your own knowledge this is the inside,——

Mr. O’Gara: Yes, it is.

Mr. Lerer: I am willing to stipulate it is so, to save the photographer having to be brought in.

The Court: It may be admitted into evidence as government’s exhibit A.

(Whereupon government’s exhibit A for identification was received in evidence.)

Mr. O’Gara: Q. Looking at government’s exhibit A, will you tell us now whether or not recall what you saw when you reached for the handle?

A. All I recall of seeing was the handle that I grabbed with my hand. That is all.

Q. Looking at government’s exhibit A, do you now see a leather strap in the middle of the upper door?

A. That leather strap was not on the side that I was when I pulled down the door, after the door came down.

Mr. Lerer: Is there a leather strap there? I didn’t see it.

The Witness: This is on that side of the back end (indicating).

Mr. Lerer: Where is the leather strap?

(Testimony of Gerald J. Trubow.)

The Witness: If that is what they call a leather strap.

Mr. Lerer: Well now, I thought it was part of a mechanism. Now let's—. I am taking your word for this counsel, and perhaps we had better find out first when that picture was [86] taken. Perhaps the strap was put on after the accident occurred as a precautionary method or measure.

Mr. O'Gara: Well, we will have competent witnesses who will establish the taking of this photograph.

Mr. Lerer: Well, maybe we had better wait, then, your Honor. I thought that was part of the mechanism.

Mr. O'Gara: We are indefinite. It doesn't matter. It may remain marked for identification until further identification.

The Court: All right.

Mr. Lerer: I didn't know it was his contention there was a strap in the door or not. Is that your contention? May—

The Court: Well, it may remain marked for identification, and he may question the witness about it. It will not be admitted into evidence before a further foundation has been laid.

(Whereupon defendant's exhibit A was withdrawn, being no longer in evidence, and was marked exhibit A for identification only.)

Mr. O'Gara: Q. Showing you government's exhibit for identification A, can you tell us whether or not you saw the strap pictured there?

(Testimony of Gerald J. Trubow.)

A. No, I did not.

Mr. O'Gara: I think perhaps the Court may want to recess at this time. [87]

The Court: Yes, but for the purpose of the record, Mr. Lerer and Mr. O'Gara, in view of the stipulation that was made, I am going to release and allow counsel to withdraw his stipulation, and then you may produce your foundation, lay your foundation and introduce the photograph into evidence. It is now in for identification. [88]

\* \* \* \* \*

### CARRUTH JOHN WAGNER

called on behalf of the defendant, sworn.

The Clerk: Q. Would you state your name to the Court? A. Carruth John Wagner.

#### Direct Examination

Mr. O'Gara: Q. Dr. Wagner, what is your profession?

A. I am a doctor of medicine employed by the United States Government.

Q. Do you have a specialty, Doctor?

A. Yes, sir.

Q. What is that specialty?

A. Orthopedics.

Q. How long have you been an orthopedic surgeon?

A. I have been in charge of the service at the United States Marine Hospital since 1946.

\* \* \* \* \*

Q. In addition to the X-rays, did you take certain photographs of the elevator door and the

(Testimony of Carruth John Wagner.)

elevator, parts of the elevator involved in the accident in question?      A. Yes, sir.

Mr. O'Gara: May we have marked for identification these three photographs?

The Clerk: All of them?

Mr. O'Gara: Yes.

Q. At whose request did you take these photographs?      A. Commanding officer's.

Q. That is, the commanding officer of the United States Marine Hospital?      A. Yes.

Q. Did you also take black and white pictures?

A. No, sir.

Q. Showing you government's exhibit A for identification, is that a picture which you took from the inside of the car?      A. No, sir.

Q. Do you know who took that picture?

A. Yes, sir. [90]

Q. Who was it?

A. This was taken by Henry Rayfield, who is the chief photographer of the veterans' hospital, Fort Miley.

Q. Was that taken at the same time that the color pictures were taken?

A. I think it was taken two or three days thereafter.

Mr. Lerer: Now just a moment. I am going to object to that as calling for the opinion and conclusion of the witness. First of all, he thinks—secondly, he wasn't present at the time the pictures were taken and doesn't know the time at all.

Mr. O'Gara: Q. Were you present at the time

(Testimony of Carruth John Wagner.)

these pictures were taken? A. Yes, sir.

Q. The second pictures? A. Yes, sir.

Q. Rayfield's picture? A. Yes, sir.

Q. Is it your recollection that they were taken at some day after your color pictures?

A. That's right, sir.

Q. That is, this picture, government's exhibit A for identification? A. Yes, sir.

Q. Were you physically in the presence of Mr. Rayfield?

Mr. Lerer: Still make the same objection, if counsel is [91] going to examine on that photograph. I presume that it hasn't been introduced in evidence yet, your Honor.

The Court: No, that is the photograph that was identified, and then was not admitted into evidence.

Mr. Lerer: Yes.

The Court: But are you objecting now, Mr. Lerer?

Mr. Lerer: Yes, I am, your Honor. I don't know the time nor the circumstances surrounding the taking of that photograph.

Mr. O'Gara: We will proceed with the color photographs first and come back to this.

The Court: Well, I was going to say, if you desire to lay a further foundation, you may do so.

Mr. O'Gara: Yes.

Q. Do you recall at what time of the year, what month, what day, as best you can recall, the color photographs which are identified as exhibits for identification for the government B, C, and D, and

(Testimony of Carruth John Wagner.)

which are now handed to you, were taken?

A. As best I can remember, it was approximately some time in May or June.

Q. If I told you that the accident in question occurred April 22nd, does that assist your recollection?

A. Not to the day, no, sir, because I can't recall the day, and I have no note of it.

Q. But it is your testimony, as I understand it, that you took the pictures after April 22nd, the date of the accident? [92]

A. That's right, sir.

Q. These pictures were taken by you with your own equipment?      A. That's right, sir.

Q. At the time that you took these pictures, who was present besides yourself, if anyone was?

A. There was Dr. Mallory, who is the commanding officer, Dr. Casper, who is the executive officer, and Dr. Crane, who is the pathologist.

Q. At the time that you took these pictures, you photographed what appears to be an elevator door. Will you tell us exactly where the location of that door was, referring now——

Mr. Lerer: Just a moment. Are we examining on that picture introduced for the purpose of identification? If so, I want to make an objection.

Mr. O'Gara: No, the three photographs.

The Court: Do you desire to offer them in evidence?

Mr. O'Gara: Not at this point, your Honor;

(Testimony of Carruth John Wagner.)

there will be further identification as to the photographs.

The Court: All right.

Mr. O'Gara: Q. Referring to photographs for identification defendant's B, C, and D, will you tell us what elevator door, if it is an elevator door, those pictures represent, where the door is located?

A. This is the picture taken of the freight elevator from the basement floor, two of them from without and one of them [93] from within.

Q. Will you tell us which are the pictures taken from without the elevator door and which is the picture taken from within?

A. B and C were taken from without, D was taken from within the elevator.

Mr. O'Gara: At this time, Your Honor, we offer in evidence defendant's exhibits for identification B, C and D.

Mr. Lerer: Well, I am going to object to that, may it please the Court, upon the ground that no proper foundation has been laid, and that the time element, which is very important as far as these pictures are concerned, has not been established; and upon that ground I make the objection.

The Court: Well, really the basis of your objection is that the time, if any, these witnesses said it was sometime in May or June of that year, is too remote from the period of time at which the accident occurred.

Mr. Lerer: Yes, your Honor; not only too remote, but secondly, we don't know the time def-

(Testimony of Carruth John Wagner.)

initely, and thirdly, we don't know whether those pictures truly represented the condition of the elevator at the time the accident occurred.

The Court: Well,—

Mr. Lerer: Three grounds, your Honor.

The Court: Well, upon the ground of improper or no proper foundation, there are photographs of the door. Now the weight of that evidence, of course, can be challenged, but as to its [94] admissibility, I think it is admissible and I will permit them to be admitted into evidence according to the numbers marked for identification B, C and D and I will have to overrule the objection.

(Whereupon photographs referred to above were received in evidence and marked defendant's exhibit B, C and D.)

Mr. O'Gara: Q. Now referring to government's exhibit A for identification, you have testified it was taken by the official photographer from Fort Miley. Were you present when this picture was taken?

A. Yes, sir.

Q. Is it your testimony that this exhibit A was taken shortly after a matter of a day or so following B, C, and D?

A. I think it was a little longer than a day. I think it was upwards to a week or ten days, because I arranged for him to come out and take the pictures.

Q. At any rate, it followed the taking of the color pictures? A. That's right, sir.



(Testimony of Garruth John Wagner.)

Q. And this black and white picture was taken in your presence?

A. Well, I was present. I showed him where the elevator was and he took the picture.

Q. Did you watch him take the picture?

A. I can't remember specifically whether I saw him take the camera and hold it and take the picture, no, sir. [95]

Q. You saw him with his camera?

A. Yes, sir.

Q. Subsequently he gave you this picture?

A. No, sir, this picture was turned over to the commanding officer of the hospital.

Q. The commanding officer of the hospital?

A. Yes, sir.

Q. You reviewed it in the presence of the commanding officer after his receipt?      A. No, sir.

Q. You saw it?

A. I saw the picture, the photograph, yes, sir.

Q. Do you recall the elevator in question?

A. I recall it, yes, sir.

Q. Have you used that elevator?

A. Yes, sir.

Q. Did you use the elevator subsequent to the accident in question?

A. On several occasions, yes, sir.

Q. On several occasions; particularly at the time that those pictures were taken, did you enter the elevator?      A. Yes, sir.

Q. Will you tell us whether—

(Testimony of Garruth John Wagner.)

The Court: When you say "those pictures", you mean B, C and D? [96]

Mr. O'Gara: Thank you, your Honor.

Q. B, C and D. At the time B, C and D were taken by yourself, and subsequent to that in that same period, did you enter that elevator?

A. Yes, sir.

Q. Did you have occasion to look at the inside of the elevator?

A. I noticed it, yes, sir.

Q. Will you tell us whether or not government's exhibit for identification A represents the conditions which were present at the time that you examined them in the elevator shaft and the elevator cage, and at the time that you took color photographs B, C and D?

Mr. Lerer: I am going to object to that question, may it please your Honor, as the time being too remote and everything—having nothing to do with April 22, 1949, when the accident occurred.

The Court: Well, I recognize there is going to be argument on this as to its weight and as to its admissibility, but since I have let the others in, I am going to allow this one in as defendant's exhibit A. But I might say to counsel, unless these are properly connected up, there is going to be some problem on their weight, and perhaps as to their admissibility on a motion to strike, if made later.

Mr. O'Gara: Yes, your Honor, we are prepared through this witness and other witnesses to develop their materiality. [97]

(Testimony of Garruth John Wagner.)

The Court: All right, you may proceed.

(Whereupon, defendant's exhibit A, being a photograph, was received in evidence so marked.)

Mr. O'Gara: Q. Now referring to government's exhibits B, C and D, it is your testimony that these were taken on the basement floor, particularly as to D, to recall this, do you remember whose hand is shown holding the handle?

A. Yes, sir.

Q. Whose hand is that?

A. That is Dr. Casper, the executive officer.

Q. Looking at D, that is Dr. Casper's hand holding what appears to be a strap? A. Yes, sir.

Q. Did you see that strap? A. Yes, sir.

Q. The strap is attached to what part of the door, the upper or the lower?

A. The upper half.

Q. The upper half. And in using the elevator in question, have you ever used that strap?

A. Yes, sir.

Q. Would you tell us in what manner you have used it?

Mr. Lerer: I object to that as being incompetent, irrelevant and immaterial, not within the issues of the case as to how and where he used the strap subsequent to April 22, 1949. [98] It is not within the issues.

The Court: Well, if you will direct it to a period of time, counsel; the objection at the moment is

(Testimony of Garruth John Wagner.)

sustained. You may proceed further, though, to qualify this testimony.

Mr. O'Gara: Yes, your Honor.

Q. Prior to April 22, 1949, the time of the accident in question, did you use this elevator?

A. Yes, sir.

Q. And on occasions have used it prior to April 22, 1949?

The Court: Well, how soon?

Mr. O'Gara: Q. How soon did you use it?

A. I have no idea of the exact dates.

Q. Well, in the course of your business in the hospital, did you have to go from top to bottom?

A. I use that freight elevator on occasions, yes.

Q. In the course of your use prior to April 22, did you go to the basement floor of the hospital?

A. I have used it from the basement floor of the hospital, yes, sir.

Q. And at that time, will you tell us in what way you opened or closed the doors in the elevator?

Mr. Lerer: I make the same objection, may it please the Court; incompetent, irrelevant and immaterial, not within the issues of the case, too remote from the day of the accident.

The Court: Well, I will sustain the objection, and I will [99] say to you, counsel, that unless the witness did so use it and can place it within some degree of proximity to this accident, or when he can place it—if he can say that it was within a month's period of time or something like that, why

(Testimony of Garruth John Wagner.)

then we can determine whether or not it is material here.

Mr. Lerer: Your Honor, may I continue with this objection, and if I might request that a closer proximity of time than a month? That strap could have been torn off a couple of days before.

The Court: Well, we understand that, but this will have to go to its weight, and he certainly has a right to describe the condition as to when he saw it, if it is within a close enough period of time to be material.

Mr. O'Gara: Q. Can you tell us, Dr. Wagner, whether or not you used this elevator during the period April 1st to 22nd?

A. No, sir, I did not. [100]

\* \* \* \* \*

CARL R. SHEPHARD

called on behalf of the defendant, sworn.

Direct Examination

Mr. O'Gara: Mr. Shepard, where do you reside?

A. San Francisco, 2447 Cabrillo.

Q. What is your occupation?

A. Mechanical engineer.

Q. How long have you been a mechanical engineer?

A. Oh, about 20 years.

Q. Are you connected with the federal agency in charge of the public buildings?

A. That's correct, yes.

Q. What is that agency?

(Testimony of Carl R. Shephard.)

A. Public Building Service, General Service Administration.

Q. How long have you been with the Public Service Administration?      A. 18 years.

Q. Were you so employed during the year 1949?

A. I was employed in the Seattle office at that time.

Q. Prior to your Seattle assignment, were you in the San Francisco office?      A. Yes, sir. [158]

Q. What period of time did you occupy in San Francisco that position, or did you have a San Francisco assignment?

A. From February, 1935 to August 17, 1948.

Q. Then you went to Seattle?

A. Went to Seattle.

Q. You returned to San Francisco when?

A. December 19, 1949.

Q. You are presently with the San Francisco office?      A. That's correct.

Q. Do you have the joint custody of the records relating to the inspection of elevators?

A. Yes, sir.

Q. And do you have custody of records relating to inspection of elevators in 1949, particularly the elevator known as the freight-kitchen elevator at the Marine Hospital?      A. Yes, sir.

Q. Did you bring at my request the record made of an inspection in 1949?      A. Yes, sir.

Q. What inspections were made in 1949?

A. There was one inspection—

Mr. Lerer: Well now, I am going to object, your

(Testimony of Carl R. Shephard.)

Honor, may it please the Court. I object to the question upon the ground it is incompetent, irrelevant and immaterial and no definite times set.

The Court: Well, he asked him what inspections were made. I will overrule the objection now, because this is just preliminary. We will find out what the point is when we get to the answer.

Mr. O'Gara: Q. What inspections were made in 1949?

A. There was one inspection made in March, March 18, 1949, and one made on September 14th.

Q. 1949? A. 1949.

Q. In the year 1949, if you know, what was the period of time or the frequency of inspections?

A. We inspected them every six months at that time.

Q. This inspection that you refer to as having been made in March, 1949, of the Marine Hospital elevators, was made by whom?

A. Was made by Mr. William Volz, V-o-l-z.

Q. Now is the report that Mr. Volz made available at this time? Do you have it?

A. I have it with me, yes.

Q. You brought that from the office?

A. I brought that from our files in the office.

Q. Kept in the regular course of business?

A. That's right, sir.

Q. What did Mr. Volz—where is he?

A. Mr. Volz is deceased.

Q. When did he die, if you know?

A. October 28, 1949.

(Testimony of Carl R. Shephard.)

Q. Will you please produce the March and September, 1949, records of inspections?

A. Yes, sir (producing). I have a copy of the report, of the letter attached to the report and the report itself, for both September and March.

Q. Well, I think that the reports themselves will be sufficient.

A. We have a written report and then we have a regular inspection, elevator inspection report form. I don't know whether you want both of them or not. I have both of them.

The Court: Well, show them to counsel and let him examine them, and counsel for the plaintiff has a right to examine them too. Those are for both March and April of 1949?

Mr. O'Gara: March and September.

The Court: I am sorry—March and September.

The Witness: That's right.

Mr. O'Gara: We offer these in evidence, Your Honor, and ask that all of them, if the Court permits, be marked as a unit. They may be lettered also, but as the next exhibit in order for the government.

The Court: All right, defendant's exhibit—

Mr. Lerer: Well, I am going to object to it, may it please the Court. It is objectionable because it is only a [161] self-serving declaration of somebody who went at a time some time a month or two before the day of the accident, and two months subsequent to the accident, and it might very well be that the strap was on the door at the time. We are con-



(Testimony of Carl R. Shephard.)

fronted with a particular date when my client was in the place and the strap was missing.

The Court: Yes, but the probative value—you are talking about probative value?

Mr. Lerer: Not only the probative value, but I say that an improper foundation has been laid, Your Honor, because it is too remote in time. Secondly, it is only a self-serving declaration.

The Court: Well, the subsequent one there may be so; there may be some merit to that, but this investigation made a month and two days, on the 18th of—this was made on March 18th, and the accident occurred on April 22nd, I understand—that would be a month and four days. It seems to me that that is within a proper period of time. But it does go to its probative value, the difference, and I don't think it goes to its admissibility. Therefore I am going to allow it to be admitted. Now as to the subsequent one, I don't think it is material. I think you are right on that.

Mr. O'Gara: Well, we might even facilitate matters by withdrawing the subsequent one. That would only go to the regularity of inspection, your Honor.

The Court: Well, he says the report has been made and he has testified to that, so it may be admitted into evidence, and the September record will not. The May report may be received.

Mr. O'Gara: All right.

The Court: And the May report will now be admitted into evidence.

(Testimony of Carl R. Shephard.)

Mr. O'Gara: Pardon me, your Honor. The March report.

The Court: I mean the March report. I am sorry.

Mr. O'Gara: And I will return this to the witness.

The Court: What number will that exhibit have, Mr. Clerk?

The Clerk: H, your Honor, defendant's H.

The Court: Defendant's exhibit H. All right. Are there two subdivisions to that?

The Clerk: Yes, your Honor.

The Court: A and B?

The Clerk: H-1 and 2.

The Court: Oh, H-1 and 2. I am sorry.

(Whereupon inspection report from Volz to Sanger and elevator inspection report, referred to above, were received in evidence and marked defendant's exhibits H-1 and H-2.)

Mr. O'Gara: Q. Now, Mr. Shephard, in the course of your duties do you inspect elevators?

A. Yes, sir.

Q. How long have you been an inspector of elevators? [163]

A. Well, 17 years, about.

Q. Do you inspect the elevators maintained in buildings operated and serviced, operated and maintained by the Federal Government?

A. All federally owned and operated buildings.

Q. And buildings in the bay area?

A. Yes, sir, and Nevada and Arizona.

(Testimony of Carl R. Shephard.)

Q. Do you inspect the Marine Hospital elevators?      A. Yes, sir.

Q. Are you familiar with the elevator here in question?      A. I am.

Q. Showing you government's exhibit B, C and D—A, B, C, and D, rather—will you kindly—. A is for identification, I believe?

The Court: No, I have admitted that.

Mr. O'Gara: Yes, that's right.

Mr. Lerer: Your Honor, I think these were introduced only for the purpose of identification, these pictures. I don't think they were introduced in evidence, were they?

The Court: Yes, they were admitted into evidence over objection, counsel, and he is now going to further identify them and tie them up so that we will—

Mr. Lerer: I see.

The Court: I have said that if they weren't further connected, that a motion to strike would be in order.      [164]

Mr. Lerer: I see.

Mr. O'Gara: Q. Have you examined those photographs, Mr. Shephard?      A. Yes, sir.

Q. Can you identify those photographs as being related to the elevator at the Marine Hospital?

A. That is it, that's right.

Q. That is the elevator?      A. Yes, sir.

Q. Are you familiar with the means provided or the device provided on the inside of the door?

A. Yes, sir.

(Testimony of Carl R. Shephard.)

Q. Of that elevator in the basement? Now what is that means? What is it?

A. It has a strap.

Q. What is it made of?

A. Well, it is made of canvas, the lower part of the strap is fastened to a metal strap.

Q. Canvas or leather?

A. Canvas or leather. It is either made of canvas or leather.

Q. Now do you know who replaces those straps if they may be, or if it is necessary to replace them?

A. Maintenance forces at the hospital.

Q. At the hospital? [165]

A. Yes, sir.

Q. Do you inspect and report to the maintenance force at the hospital?

A. When an inspection report is made, it is given to the hospital.

Q. Now is the inspection that you conduct the same kind of inspection, if you know, which Mr. Volz conducted?

A. Absolutely. They are standard.

Q. In the course or following it—

A. Same procedure.

Q. Following the inspection, do you report to the individual at the hospital responsible for the maintenance of—

A. I report. I report it to him verbally before I leave if I find anything like that missing.

Q. Now who is that individual?

A. That is the superintendent, Mr. Bellamy.

(Testimony of Carl R. Shephard.)

Q. Was Mr. Bellamy the superintendent at the time that this accident was supposed to have occurred, April, 1949?

A. I believe he was. I wasn't here then, but I believe he was, before I left. I take it he was—I take it for granted he was while I was gone.

Q. Will you tell us whether there are any other buildings in San Francisco which you have inspected which employ this type of elevator?

A. Right in this building. [166]

Q. Right in this building; and others?

A. Federal Office Building.

Q. Do you know how long this kind of elevator door has been in use anywhere?

A. On that kind of elevator, that kind of door has been in use, I should say, for 25 or 30 years.

Q. And do you know——

A. It is a standard type of freight elevator door, what is called a bi-parting hoist-way door.

Q. Do you know if this kind of elevator door is used on civilian installations as well as government?

A. Yes, sir.

Q. You have seen those?           A. Oh, yes.

Q. Is there any other inspection service provided for this elevator?

A. No, only the inspection that the maintenance force makes from time to time.

Q. That is the staff of the hospital?

A. That's right.

Q. But no elevator service?

A. No regular inspection is made by the public

(Testimony of Carl R. Shephard.)

buildings service. They make a maintenance inspection from time to time. I don't know how often they do that. I suppose they have a routine. [167]

Q. The State inspects, makes no inspection out there?

A. The State inspects—to my knowledge, it makes no inspection. But they are welcome to, if they want to, but they don't. They don't want to come into federal property.

Q. Federal property is inspected by you and others? A. That's right.

Q. Now on the basis of your experience and particularly your inspection experience, will you tell us whether or not this type of freight elevator door was usual or unusual, this type of door?

A. Well, I would say it is a usual type of door.

Mr. O'Gara: No further questions.

#### Cross-Examination

Mr. Lerer: Q. Mr. Shephard, you don't know as to whether on April 22nd, 1949, there was a rubber or canvas extension on this elevator we have been talking about, do you?

A. I do not.

Q. As a matter of fact, you were out of the city between——

A. That's correct.

Q. During that time, I think the date was——

Mr. O'Gara: April 22, 1949.

Mr. Lerer: Q. August, 1948, to December, 1949?

A. That's correct, sir.

Q. So what transpired on the premises is only

(Testimony of Carl R. Shephard.)

what you know from somebody who has passed away and made a written report? [168]

A. That's right.

Q. Now looking at defendant's C, do you there see any strap that is hanging down?

A. None.

Q. I see.

Mr. Lerer: That's all. Oh, just a moment.

Q. If Mr. Volz, who has passed away, or anyone else had seen the elevator in this condition, what would their report have been to you?

A. Well, he would have reported that on that inspection report that you saw there.

Q. But you had no such report at any time, did you, that there was a strap missing from this elevator? A. I did not.

Mr. Lerer: That is all.

Redirect Examination

Mr. O'Gara: Q. Mr. Shephard, looking at defendant's C, isn't that a view of the outside of the door?

A. That is the outside of the door.

Q. Isn't it a view that would not show the strap?

A. There wouldn't be any strap on the outside of the door.

Q. The handle is on the outside?

The Court: Unless it hung down from the inside.

A. The strap is always on the inside.

The Court: Let me ask this question, though, right on [169] this point, so we can understand this. Does

(Testimony of Carl R. Shephard.)

not the strap extend below the base of the top of the—the base of the top door?

The Witness: Yes, it would, when it got down from this far from the opening, the strap would extend below this point (indicating).

Mr. Lerer: Here is a picture, No. C, your Honor, that shows it.

The Court: Let him look at No. C, counsel.

Mr. O'Gara: I think the witness has C.

The Court: He has C here now. That is what we are referring to.

The Witness: C is the outside of the door, and the point is that it would be visible between the doors if something weren't obstructing the view.

Mr. O'Gara: Q. Looking at defendant's C, Mr. Shephard, from that picture can you tell us whether or not the strap behind is being held up by the left hand of the individual who is posing there?

A. I can't tell. That is impossible to tell. I can't see.

Mr. Lerer: I think the picture speaks for itself, your Honor.

The Court: The picture speaks for itself. You can show him the other pictures.

Mr. O'Gara: Q. Now looking at picture D, can you tell [170] us whether or not the strap pictured in picture D,—

A. That is the strap inside the elevator.

Q. Now if the hand pictured in picture D, the hand pictured there, were holding the strap between C,—or rather, were holding the strap when the picture



(Testimony of Carl R. Shephard.)

C was taken, would it be your testimony that the strap would be invisible in C?

The Court: Well, I think——. I mean, counsel, that is a conclusion that the Court can draw.

Mr. Lerer: Not an x-ray picture, your Honor. You could just look at it.

The Court: Yes. In other words, that is argument, counsel. This witness doesn't have to prove that.

The Witness: It looks to me, if I may say so, as if in this picture D, that he was opening the elevator, pushing the elevator door down.

Mr. Lerer: Well, I don't know, Mr. Shephard—you are getting into what happened. You just don't know. I just have one question to ask, your Honor.

Recross-Examination

Mr. Lerer: Q. I show you defendant's D and ask you to take a look at that strap.

A. Yes, sir.

Q. I now show you exhibit A and ask you to look at that strap. Now both those evidently are pictures of the inside of this particular elevator, are they not? [171]

A. Yes, sir.

Q. And are those straps the same?

A. No, one of them is broke.

Q. They are different?

A. One of them is broken off.

Q. How about besides one of them being broken off—wouldn't you also say that the shape of those two straps are different? A. Well,——

(Testimony of Carl R. Shephard.)

Q. Just take a look at it, Mr. Shephard, and look on top of the strap, where one is round and the other, the ends are cut off. Wouldn't you say that is another difference?

A. That is a difference. There appears to be a difference there on top of the strap.

Q. Yes. And isn't there a third difference that you haven't seen?

A. Well, the third difference that I see, that it doesn't have the tailpiece on it.

Q. All right. Then isn't there a fourth difference you haven't seen?

A. Let me see. (Examining.)

Q. Well, let me point out to you, to save time, Mr. Shephard. A. Sure.

Q. Take a look at the screw that is holding the rubber handle on exhibit A. Take a look at that.

A. You don't mean the rubber handle, you mean the strap? [172]

Q. The strap.

The Court: Well, is that rubber or leather?

The Witness: I can't tell. It looks like leather. Well, the strap—you are talking about the strap?

Mr. Lerer: Yes, the strap.

Q. Take a look at the metal or the metallic substance holding the strap on defendant's D, and see if that isn't a fourth difference in the two straps; is that correct?

A. Well, let's see. There is something on there.

Q. Yes.

A. There is something on there, it is either—

(Testimony of Carl R. Shephard.)

they are both fixed with a nut, but there is something beneath the nut on the other thing.

A. A appears—it appears there have been two attempts to put straps on that particular elevator, doesn't it? A. I wouldn't say two attempts.

Q. All right, let's say one attempt; is that correct?

A. Well, it looks like there had been——. It don't look like the same strap to me.

The Court: There has been a change?

Q. (By Mr. Lerer): There has been a change?

A. May have been trimmed with a knife, but it has been changed. It is not the same.

Q. Have you anything in your reports to show that Mr. Volz or anyone else inspected those premises and showed that a [173] strap should be changed?

A. No, the report is what you have there.

Mr. Lerer: Yes, that's all. Thank you.

Further Redirect Examination

Mr. O'Gara: Mr. Shephard, looking at these two photographs, A and D, could you tell us whether or not those are the same doors pictured?

A. Oh, sure.

Q. Are you positive?

A. I would stake my life on it.

Mr. Lerer: Do you know what that means?

Mr. O'Gara: No, I——

The Court: He is saying positively that they are. I will permit the language to stand and interpret it to mean that.

The Witness: I am sorry, Judge.

(Testimony of Carl R. Shephard.)

Q. (By Mr. O'Gara): You know there are several floors in that building, Mr.—

Mr. Lerer: Well now, are you trying to impeach your own witness, counsel? That is what he is doing, your Honor.

The Court: Well, are you objecting on that ground.

Mr. Lerer: I am objecting on the ground that he is attempting to impeach his own witness.

The Court: I haven't heard the question yet, and when he does start to impeach his own witness, you may object. He has the right, counsel, to explain his testimony. [174]

Mr. Lerer: Well, the witness has, your Honor. If he wants to change his testimony.

The Court: And counsel has the right to recall other matters to his attention that may be explanatory in this matter, rather than in the sense of being inconsistent.

The Clerk: Exhibit I for identification.

(Whereupon photograph of elevator referred to above was marked defendant's exhibit I for identification.)

Mr. Lerer: Well, that has—

The Court: That is something that is going to be introduced in evidence?

Mr. O'Gara: Yes.

The Court: You may examine it, counsel.

Mr. Lerer: I didn't see this one before, your Honor. This is new.

(Testimony of Carl R. Shephard.)

The Court: Well, you have the right to examine it before it is offered, and before it is offered for identification. Has it been identified yet?

Mr. O'Gara: It has been identified as exhibit I for identification.

The Court: All right.

Q. (By Mr. O'Gara): Now looking at I for identification, will you compare the picture——

The Court: No, just a moment. You had better qualify that picture before you have him compare it. [175]

Q. (By Mr. O'Gara): Can you identify that picture, what it represents?

A. That is the exterior, the door of the elevator from the outside, from the kitchen side.

Q. Now, Mr. Shephard, referring to I——

A. This is I?

Q. Yes. Referring to the picture of the strap, will you compare, please, and examine the strap pictured there and the strap pictured here in D?

Mr. Lerer: Well, just a moment, counsel; it hasn't been introduced in evidence, and I make the same objection to that picture. I don't know the time it was taken and it is too remote from the time of the accident.

The Court: Well, do you offer it in evidence, Mr. O'Gara?

Mr. O'Gara: Yes, we offer it in evidence on the basis of this witness' testimony that this is a picture of the exterior kitchen side of the elevator entrance.

(Testimony of Carl R. Shephard.)

Mr. Lerer: Ask him when it was taken.

The Court: Well, he has a right to know that.

Mr. O'Gara: Yes.

Mr. Lerer: When was it taken?

Mr. O'Gara: This witness, of course, would not know that.

Mr. Lerer: Well, that is your answer.

The Court: Well, until we have some idea of the time it was taken, I think the objection is well taken, Mr. O'Gara. [176]

Mr. O'Gara: Well,—

The Court: I mean, you had better identify that picture for us from someone who knows when it was taken, so that it may be introduced in evidence. I assume that it is a picture that might have been taken recently, for instance, but you would have to explain those factors to this witness so that he could make a proper comparison.

Mr. O'Gara: In explanation, it was only with the thought of saving time, your Honor. I realize that counsel certainly is entitled to a full and complete foundation as to the origin of the picture.

The Court: Well, he has made his objection and it is sustained, and until you do properly lay the foundation, I will have to rule that it is not permissible to use in evidence.

Mr. O'Gara: Well, if the picture were limited at this time as evidence only as a picture of the strap shown in the picture already in evidence, defendant's A, perhaps we can do it that way.

Mr. Lerer: For what purpose, counsel?

(Testimony of Carl R. Shephard.)

Mr. O'Gara: Well, I think we will save time if I simply explain that the purpose of all this is to show that the two straps photographed, the strap photographed in D and photographed in A, are different straps on different floors, entirely different.

Mr. Lerer: Well, do I understand you are trying to [177] introduce in evidence a door that has been identified as a door involved in this accident and that that isn't the door?

Mr. O'Gara: No, that wasn't the testimony at all.

Mr. Lerer: Well then, what are you trying to say? I don't follow you, counsel. I mean, there are two different doors?

Mr. O'Gara: The testimony of the doctor who identified defendant's exhibit A was that it was a picture of the interior of the elevator car and there was no testimony as to the floor or the door involved in the accident. There is no testimony at all in that respect.

The Court: But this witness has identified it as being the door in the picture.

Mr. O'Gara: I think this witness has already indicated that he didn't know.

Mr. Lerer: He said it was identical, and that is the time that I left, your Honor, just to refresh your memory. He said that is identical, and that is the evidence.

The Court: Well, if the witness desires to correct his testimony, he may do so.

The Witness: I didn't—I don't believe you asked me, counsel, which door that was.

(Testimony of Carl R. Shephard.)

Q. (By Mr. O'Gara): Well, that is what I was going to get to, but I was blocked.

The Court: Well, refer to defendant's exhibit A, which [178] is the one that is under discussion, and we will leave I out of this thing. Interrogate the witness about it and find what his recollection is.

Q. (By Mr. O'Gara): The question is whether or not you know from examining those pictures, whether they refer to the same door.

A. I don't know, on the inside, no.

The Court: He does not know whether A and D are the same door? All right.

#### Further Recross-Examination

Q. (By Mr. Lerer): Can you tell from this which door was involved in the accident?

A. I can't.

Q. You can't. A. No, no, sir.

Q. So all that you have testified from these photographs is that it is just a door in the Marine Hospital?

A. That's right, that is the Hoist-way elevator door. Which one, I don't know.

Mr. Lerer: That's all.

Mr. O'Gara: No further questions.

(Witness excused.)

The Court: Are there any further questions of this witness?

Mr. Lerer: No, other than I would like to know—I have [179] no further questions.

The Court: You are excused, Mr. Shephard.



Mr. Lerer: Perhaps we might ask the reporter to check the testimony of the doctor. It is my recollection that he said that he took the photographer downstairs and he didn't stay there actually while he took it, but he testified that that actually was a picture of the door involved in the accident. I definitely remember that.

Mr. O'Gara: Well, if that was the testimony, I don't recall it. It is my recollection that the testimony was that the man got into the car and the purpose of the picture was a picture of the inside of the car.

The Court: Well, my recollection of his testimony is that it was a photograph taken by the photographer at Fort Miley a week or ten days after B and C and D were taken.

Mr. Lerer: Yes.

The Court: Now I am not entirely positive that the witness said it was the same door, but that is the record, and the record is the way it is. Now if you want to correct it, it is up to you to do it, Mr. O'Gara.

Mr. O'Gara: Yes. Well, your Honor, I think that it might be desirable to make it absolutely clear with Doctor——

The Court: That is up to you. The record is in the condition that it is in now.

Mr. O'Gara: As I recall, I was particularly careful. I [180] asked him whether or not he went into the elevator and he said no, he didn't go in the elevator and he wasn't with the man when he used his camera.

Mr. Lerer: He said he took him downstairs to the door and left him there.

The Court: Let's not argue now. The point is that the record is in the shape that it is in, and whatever the record shows will be what you are going to have to stand on, Mr. O'Gara.

Mr. O'Gara: Yes.

The Court: And the burden is on you to either make the effort to correct it if it needs correcting, or stand on what there is.

Mr. O'Gara: Yes. Well, I think that the best thing would be to recall Dr. Wagner and clarify the record.

The Court: That's your privilege. You may do so.  
\* \* \* \* \*

[181]

### WILLIAM B. BELLAMY

called on behalf of the defendant, sworn.

\* \* \* \* \*

### Direct Examination

Q. (By Mr. O'Gara): Mr. Bellamy, where do you reside?

A. 315 Magellan Avenue, San Francisco.

Q. What is your occupation?

A. Building superintendent, United States Marine Hospital, San Francisco, California.

Q. How long have you been the building superintendent there?

A. Went there on May 18, 1947. [182]

Q. You were the acting building superintendent in May, 1949? A. That's right.

Q. Shortly after April 22nd or at some time after April 22, 1949, did you learn of an accident in the so-called freight kitchen elevator?

(Testimony of William B. Bellamy.)

A. I did, sir.

Q. And following—when was that, if you recall? When was that that you first heard of it?

A. It was either on May 11th or May 12th.

Q. When you heard of it, what did you do with respect to the elevator?

A. I went for the medical officer in charge and made an inspection of the freight elevator.

Q. Who was the person you went to see about this? A. Dr. Charles R. Mallory.

Q. Showing you government's exhibits B, C and D, will you tell us in particular,—well, I think we can eliminate B and C. Now looking at defendant's D, will you tell us whether or not that picture represents the elevator when you inspected it in May, 1949?

Mr. Lerer: May I take a quick look at it?

Mr. O'Gara: Oh, yes.

Q. In respect to the door strap, particularly?

A. I can't state for sure, sir.

Q. Do you recall making your inspection? [183]

A. When I went down, everything was satisfactory at the time.

Q. Well, you recall making the inspection, of course? A. Yes, sir.

Q. At that time did you inspect the door to see whether or not the door had a strap?

A. Well, if they hadn't been a strap on the door, we wouldn't have considered it satisfactory.

Q. Now did you, following your inspection, require any work to be done on the elevator?

(Testimony of William B. Bellamy.)

A. No, sir.

Q. Prior to your inspection, between April 22nd and the time you made your inspection, did you or did any person at your direction make any repairs on that elevator?

A. Not to my knowledge. As I remember, on the 18th of March the elevators were inspected by the mechanical engineer from the public building administration, and at that time——

Mr. Lerer: We are going to object to that and ask it be stricken as not responsive.

The Court: That's right. Let's—. Mr. Bellamy, let's confine your answer to his direct question. You may anticipate something, but he will be asking you those questions in the future.

Q. (By Mr. O'Gara): Mr. Bellamy, the building elevators at the Marine Hospital are inspected regularly, are they not?      A. Yes, sir. [184]

Mr. Lerer: I am going to object to that, that whole line of questioning, as being incompetent, incompetent and immaterial. We are more concerned with the date of April 22nd, 1949, your Honor.

The Court: Well, I will overrule that objection.

Q. (By Mr. O'Gara): In 1949, prior to April 22, 1949, was there an inspection?

A. Yes, sir, it was made on March 18, 1949.

Q. Now did you consult your records to determine——

A. I brought the cards that are in the elevators, sir.

Q. Well, you may——counsel may want to examine

(Testimony of William B. Bellamy.)

them, but I think they are just cumulative of what Mr.——

The Court: Well, all right. If you do not desire to produce them, you don't have to.

Q. (By Mr. O'Gara): Mr. Volz made the inspection. Did you see Mr. Volz on the occasion of that inspection?

A. No, sir, I had gone on the 13th of March back to Washington, D. C., and I didn't return until three o'clock the morning of April 21st.

Q. You were there April 21st?           A. Yes, sir.

Q. Now in coming to court here today, at my request, did you check your records to determine whether, between March 18, 1949, and April 22, 1949, there was any report of any inspection other than Mr. Volz'? [185]

A. I consulted with my maintenance men and they said that they hadn't done any work on the elevator to the best of their knowledge.

Mr. Lerer: We are going to object to that as calling for the opinion and conclusion of the witness and ask that it be stricken.

The Court: The answer is stricken and the answer will be "No"; that will stand. The answer will be that there was no inspection made.

Mr. O'Gara: All right.

Q. Work orders are prepared, of course, for the work done on the elevator, is that correct?

A. Yes, sir.

Q. Or any of them?           A. Yes.

Q. Did you check your records for any work orders between March 18, 1949?

(Testimony of William B. Bellamy.)

A. The record is unavailable.

Q. On April 22, 1949?

A. We received—can I explain this?

The Court: Did you say the records are in the elevator—if you say they are unavailable, why—

The Witness: We receive between five and six hundred work requests a month, and as you can see,— I mean, it would be impossible for us to maintain a complete file from year to year. [186]

Q. But you have no record of any work done on this elevator between March 18th and April 22nd?

A. No, sir.

Q. 1949. Now when you made your inspection,—

The Court: Well, just a moment. I would like to ask a question here. When you say “No, sir,” and you say you have no record, does that mean that there was no record of any work done or that the record, if there was one, would be destroyed?

The Witness: The records would have been destroyed, sir.

The Court: All right.

Q. (By Mr. O’Gara): All right. Now in connection with your inspection in April or May, 1949, as I recall it was on May 11th—is that what you said?

A. It was either the 11th or the 12th, sir. I am not sure. But when we were notified that the suit was being brought, Dr. Mallory asked me to make an inspection.

Q. And when you made that inspection, did you order any work to be done? A. No, sir.

Mr. O’Gara: No further questions.

(Testimony of William B. Bellamy.)

Mr. Lerer: No questions.

(Witness excused.)

The Court: All right.

Mr. Lerer: Other than one question.

The Court: Will you take the seat again, please?

(Witness resumed the witness stand.)

### Cross-Examination

Q. (By Mr. Lerer): If somebody would put a strap on, would there be a record of it in particular?

A. There would be a record if it was among our current work orders. That far back, there would be no record remaining.

The Court: Would there have been a record made at the time it was put on?

The Witness: Yes, sir.

The Court: Is that invariably true in a minor repair?

The Witness: Well, I can't say that they would put everything down, sir. That is impossible.

Q. (By Mr. Lerer): Well, Mr. Bellamy, you know as a matter of fact, that just taking a little strip there and tacking it up, there wouldn't be any of these usual forms filled out that are filled out in the hospital, would there?

A. Our forms aren't very complicated, sir, and we insist that they do, because we have a limited number of maintenance people, and if I don't, I can't schedule their work properly.

Q. So you would say that if a man did put up a

(Testimony of William B. Bellamy.)

strap like that, he would make out a complete record and report?

A. On the elevator inspections, they do, sir, because that is something we have to watch.

Mr. Lerer: That's all. [188]

#### Redirect Examination

Q. (By Mr. O'Gara): Mr. Bellamy, when you made your inspection in May, 1949, Mr. Mallory or Captain Mallory told you that there had been a claim filed in this matter, did he not? A. Yes, sir.

Q. And at that time isn't it a fact that—I shouldn't put it that way.

At that time did you review your records at Dr. Mallory's request in relation to this elevator?

A. No, sir, I didn't.

The Court: The answer is no, sir, he did not.

Mr. O'Gara: No further questions.

Mr. Lerer: That's all. Thank you, Mr. Bellamy.

(Witness excused.)

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#### ALBERT T. MITCHELL

called on behalf of the defendant, sworn.

#### Direct Examination

Q. (By Mr. O'Gara): Where do you live?

A. I am stationed at the Marine Hospital.

Q. What is your occupation?

A. Storekeeper.

Q. Were you a storekeeper or assistant storekeeper in April, 1949? A. Yes, sir.

Q. Are you familiar, in general, with the action



(Testimony of Albert T. Mitchell.)

that is being heard here? The case of an alleged accident on the elevator?

A. Well, I am now. I have heard——

Q. Recalling April, 1949, were you on duty in the storeroom?

A. I was working that day, yes, sir.

Q. And working in the storeroom and about the storeroom in that vicinity?

The Court: Is this April 22nd, now?

Mr. O'Gara: Yes, April 22, 1949.

A. Yes, I was working that day.

Q. (By Mr. O'Gara): You have checked the records to make sure you were working that day?

A. Well, I didn't check, but I mean, within about six or seven months either before or after, I hadn't been off for over a year, and I know I was working that day.

Q. At that time while you were on duty, did anyone make a [190] request of you to use the freight elevator?      A. No, not to me, sir.

Q. No one?      A. No one.

Q. In connection with the removal from the hospital of certain beds and refrigerators, did you assist anyone?      A. No, not me.

Q. Did you at any time, without a request, direct anyone on that day to use the elevator?      A. No.

Mr. O'Gara: No further questions.

#### Cross-Examination

Q. (By Mr. Lerer): How many people on the floor that you were working at, Mr. Mitchell?

A. Working together?

Q. All the people at work on the basement floor

(Testimony of Albert T. Mitchell.)

or might come down there, people that you——

A. Well, there's five, the plumbing——

The Court: Will you speak up?

A. (Continuing): There's about twelve, sir, that work down there all the time.

Mr. Lerer: All the time. That's all.

#### Redirect Examination

Q. (By Mr. O'Gara): Mr. Mitchell, how many people work in the storeroom? [191]

A. Oh, in the storeroom, it's five.

Q. Well, on that particular day, do you know how many people were working?

A. There was four, because Mr. Fleming, he is our boss, he was on vacation.

Q. Who were the people working besides yourself?

A. Mr. Whittaker and Mr. Kellogg and myself. There was three of us.

Q. Three of you then? A. Yes.

Mr. O'Gara: No further questions.

#### Recross-Examination

Q. (By Mr. Lerer): Do you people come out of the corridors? You are in the corridors at will from time to time, aren't you?

A. Yes, because we have a pretty big area.

Mr. Lerer: Yes, that's all. Thank you.

The Court: What names were those, those other two people? Whittaker and who else?

The Witness: Kellogg—Mr. Kellogg.

Mr. O'Gara: I have no further questions.

(Testimony of Albert T. Mitchell.)

The Court: Any further questions, Mr.—

Mr. Lerer: No questions, your Honor.

The Court: You are excused.

(Witness excused.)

Mr. O’Gara: Perhaps it will facilitate matters if the [192] two men he mentioned, Mr. Kellogg and Mr. Whittaker—Mr. Whittaker occupies a comparable position to this gentleman and would testify to the same effect. If counsel wants to save time and stipulate, fine. Mr. Kellogg, on the other hand, is a superior, a superintendent in that office, and it would be necessary to have him testify. But since Mr. Kellogg is here today and Mr. Whittaker is here today, perhaps it might be stipulated to save their return.

The Court: Well, I don’t know whether counsel wants to stipulate.

Mr. Lerer: We will see; well, is he just a store-keeper like this man?

Mr. O’Gara: Just like this man.

Mr. Lerer: He would say the same thing?

Mr. O’Gara: He would say exactly the same thing.

Mr. Lerer: That’s Mr. Whittaker?

Mr. O’Gara: Yes.

Mr. Lerer: I will stipulate.

The Court: All right, then the stipulation will be accepted that Whittaker would testify to the same thing. [193]

\* \* \* \* \*

CARRUTH JOHN WAGNER

recalled as a witness on behalf of the Government,

(Testimony of Carruth John Wagner.)

being previously duly sworn, testified further as follows:

Direct Examination

By Mr. O'Gara:

Mr. O'Gara: There was some question, if the Court will recall, about the picture in Defendant's Exhibit "I", for identification; Defendant's Exhibit "A", in evidence; and Defendant's Exhibit "D", in evidence. All these pictures show pictures of a certain strap.

Mr. O'Gara: Q. Dr. Wagner, will you please examine these pictures (handing exhibits to the witness). Do you know what floor, doctor, Defendant's Exhibit "I", for identification, is?

A. This is taken on the first floor.

Q. By the first floor, do you mean the basement?

A. No, sir; the first floor, that is, the kitchen floor.

Q. Above the basement? A. That is right.

Q. Referring to Government's Exhibit "Q", in evidence, and particularly the strap pictured there, do you know, doctor, whether that strap is the same strap as pictured in "D", Defendant's Exhibit "D" in evidence?

A. It would not appear to be the same strap, no sir.

Q. Referring to Defendant's Exhibit "A" for identification——

The Court: No, "A" is in evidence.

Mr. O'Gara: Q. Pardon me, I meant "I" for

(Testimony of Carruth John Wagner.)

identification, [196] which you have just testified is a picture taken on the first or kitchen floor——

A. Yes, sir.

Q. Do you see there a strap?

A. Yes, sir.

Q. Will you tell us whether that is the same strap?

A. It appears to be the same strap, yes, sir.

Q. And that strap, then, would be the strap at the kitchen floor?           A. Kitchen floor.

The Court: Doctor, just a moment; I want to ask you this question: You say it appears to be. Of your own knowledge do you know that they are the same strap?

A. In these two pictures? No, sir, I can't identify this picture of my own knowledge.

The Court: Is that "I"?

Mr. Lerer: That is "A", your Honor.

A. This one I am sure of.

The Court: You are sure of "I" but not of "A"?

A. No, sir. It is from the inside of the elevator and I can't say.

The Court: You wouldn't know what floor that is?

A. Not from my own knowledge. The straps appear identical.

The Court: The appearance of that can be compared by the Court, and counsel can admit it. You don't need this [197] witness to make that comparison.

Mr. O'Gara: Very well, your Honor.

The Court: I want to know from the witness of

(Testimony of Carruth John Wagner.)

his own knowledge if he knows they are the same, and he says they are not.

Mr. Lerer: So I can have a clarification, do I understand these are the same?

Mr. O'Gara: Yes.

Mr. Lerer: And they are the first floor above the basement?

Mr. O'Gara: Yes, the kitchen floor.

Mr. Lerer: Is that what he testified to?

The Court: No.

Mr. O'Gara: No, that is not what he testified to, but I thought for clarification, there is another witness who will testify to that.

The Court: To get this straight, because we have had considerable conversation here, the witness has testified that Defendant's Exhibit "I" is taken on the kitchen floor above the basement. That is one floor above, is that correct, doctor?

A. That is this one, yes.

The Court: "I"? A. "I".

The Court: That "A", you can't say what floor it is taken [198] on from the photograph itself?

A. No, sir, I can't.

The Court: All right, that is all.

Mr. O'Gara: "Q", your Honor, I think the witness testified is from the inside. Correct.

The Court: Yes, we understand that. [199]

\* \* \* \* \*

Cross Examination by Mr. Lerer

Q. Doctor, these straps attached to the doors, and I refer specifically to Exhibit "I"—Withdraw that question. Look at Defendant's Exhibit "I", and re-

(Testimony of Carruth John Wagner.)

ferring specifically to the door, does the door ride with the elevator or does that remain on the floor?

A. These doors remain on the floor.

Q. Defendant's Exhibit 'A', was that the picture, doctor, you directed to be taken?

A. Well, I am not sure. I understood—I will have to explain that. I was at surgery when this man came to take these pictures, and as I remember it was around noon, and I came down in the company of another doctor whom I can't recall who he was. He took some pictures on the first floor, and it was my understanding, but I wasn't present, that he went down and took them on the basement floor. [211]

Q. So you would say that this picture I refer to, Exhibit "A", was the picture taken on the basement floor?

A. No, sir; I don't know.

Q. Do you recall that was a Friday that this was taken on the basement floor?

A. I don't recall, no, sir. I recall on my own films because I took them myself, but on these I am not sure.

Q. Which ones are those?

The Court: The colored ones.

A. The ones I took personally, the colored ones.

Mr. Lerer: Q. These colored films, Defendant's Exhibits "B", "C", and "D" were actually taken on the——

A. Basement.

Q. ——basement floor where the accident oc-

Q. Is that taken at the same time? A. Yes.

Q. They were taken at the same time?

A. Yes, sir.

The Court: At the same time? The three pictures were taken at the same time?

Mr. Lerer: Yes.

The Court: You don't mean the same time as "A"?

A. No, these were taken before "A".

Mr. Lerer: Q. Do you remember how long after May 22nd [212] these were taken?

A. After April 22nd?

Q. After April 22nd?

A. No, sir. It was in May.

Q. About a month? A. Less than a month.

Q. Month, two weeks, or three weeks?

A. I couldn't say for sure. I can only give you an estimate, which is of no value.

Mr. Lerer: I think that is all, your Honor. [213]

\* \* \* \* \*

### GERALD J. TRUBOW

Plaintiff herein, recalled, being previously sworn, testified further as follows:

Cross Examination By Mr. O'Gara, Cont'd:

Mr. O'Gara: Mr. Trubow, will you tell us, if you can, why, when you took pictures of the elevator and the premises at the Marine Hospital you did not take a picture of the strap on the basement door?

A. Because I wasn't informed to take any particular pictures of the elevators.

Mr. Lerer: Wait. Will you read that question back, please?

(Question read by the reporter.)



(Testimony of Gerald J. Trubow.)

Mr. Lerer: Did you understand that question?

A. If I understand it correctly, he wants to know why I only [232] took pictures of the outer part of the elevator.

Mr. Lerer: I didn't think you understood it. He said why didn't you take a picture of the strap?

A. Because there wasn't any on the inside.

The Court: Did you hear the answer, Mr. O'Gara?

Mr. O'Gara: I am sorry, I was consulting——

The Court: His counsel informed him the question was why didn't he take a picture of the strap, and his answer was because there wasn't any strap.

Mr. O'Gara: Q. Do you remember the photographer, your friend Mr. Lieberman, I think his name was, who went with you, calling to your attention the existence of a strap?

A. He called my attention that there was just a piece of a strap in the elevator.

Q. Well, Mr. Trubow, why didn't you take a picture?

A. Because my attorney told me not to. He didn't tell me to take any particular kind of picture. He just said, "I would like to have you take pictures in the elevator," which I proceeded to do.

Q. You did not take a picture of the strap?

(Testimony of Gerald J. Trubow.)

A. We didn't take a picture of anything in particular but the elevator. [233]

\* \* \* \* \*

The Court: Then you are excused at this time, Mr. Trubow.

Witness excused.

The Court: Any further witnesses for your case-in-chief, Mr. Lerer?

Mr. Lerer: We are waiting for Mr. Leiberman, your Honor. We just want to confirm the fact that when he took these pictures, that was the picture, and the broken strap.

Mr. O'Gara: We will stipulate he took the pictures and, I don't know, I suppose he would testify a certain way about the strap.

Mr. Lerer: Well, the stipulation being that there was a strap there inside, but only half an inch long? [236]

Mr. O'Gara: Well, we won't stipulate as to the length of the strap.

The Court: You better bring the witness back in the courtroom until we reach this stipulation, then we will find out whether to call the witness or not.

Mr. Lerer: Perhaps we can stipulate that there was no strap showing?

Mr. O'Gara: No.

The Court: I don't think counsel can stipulate to that.

Mr. O'Gara: I would say I would stipulate that he took the pictures which are in court and he did not take a picture of a strap.

Mr. Lerer: But we don't need a stipulation to that because you have that in evidence.

The Court: Yes. I would say you better proceed with Mr. Lieberman, if you are going to proceed with him. Do you have any witnesses?

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ADELBERT E. KELLOG

called as a witness on behalf of the Government, being first duly sworn, testified as follows: [237]

\* \* \* \* \*

Direct Examination

By Mr. O'Gara:

Q. Mr. Kellog, where do you reside?

A. 431 10th Avenue, San Francisco.

The Court: Will you speak up so that the reporter and counsel can hear you, Mr. Kellog?

A. Yes.

Mr. O'Gara: What is your occupation?

A. Assistant Storekeeper in the United States Marine Hospital.

Q. Were you Assistant Storekeeper there in April, 1949; particularly April 22nd, 1949?

A. I think that is correct.

Q. How long have you been Storekeeper in the Marine Hospital?

A. Oh, some eighteen years, I believe.

Q. And at that time, April 22nd, 1949, who were the people employed in the Storekeeper's Department at the Marine Hospital?

(Testimony of Adelbert E. Kellog.)

A. There is a Mr. Fleming; he was Chief Store-keeper; and myself, and two assistants, Arthur Whittaker and Albert Mitchell.

Q. Mr. Mitchell was here in this court and appeared as a witness? A. That is right.

Q. Mr. Whittaker was called but did not appear?

A. That is correct. [238]

Q. On April 22nd, 1949, was Mr. Fleming present in the storeroom?

A. He was away at the time.

Q. Are you the person next in command of the storeroom? A. That is correct.

Q. You were at that time, too?

A. At that time.

Q. While you were in charge on April 22nd, 1949, in the storeroom of the Marine Hospital, did Gerald Trubow, the plaintiff in this case, come to you in connection with the delivery of certain, or pick-up of certain beds and refrigerators?

A. I never connected that with that date.

Mr. Lerer: What?

The Court: He said he never connected him with that date.

Mr. O'Gara: Q. Do you know Mr. Trubow?

A. I don't know Mr. Trubow.

Q. If I point him out to you as the gentleman sitting in the front row, do you recognize him now?

A. No, I don't recognize him.

Q. On April 22nd, 1949, did any individual, anyone besides Mr. Trubow, approach you and talk to

(Testimony of Adelbert E. Kellog.)

you about refrigerators and beds at the Marine Hospital?

A. No, there was no one came to me at that time.

Q. On the basis of your experience and the practices at the [239] Marine Hospital, will you tell us what was the procedure followed by your storeroom in connection with the delivery of property of that kind, beds and refrigerators, with which we are concerned?

Mr. Lerer: We will object to that, may it please the Court, as being incompetent, irrelevant and immaterial, what the general procedure is.

The Court: Well, I will overrule the objection. He can testify what the custom and practice is.

Mr. O'Gara: Q. What was the practice followed by you in respect to the delivering of this kind of property sold under bid and to be picked up by the purchaser? Tell us exactly how the defendant first enters the picture in connection with the delivery of that property? What did you do?

A. The Supply Officer sends down one of the bids, or I should say the descriptions, bid's descriptions of the articles that are sold, and that is the notification to us that there will be somebody around there to pick these things up if they have—the bids have already gone in and it has been sold, and I am quite sure we had them in the storeroom at that time, on that date.

Q. You are speaking of the beds and refrigerators?

A. That is right.

Q. In connection with April 22nd, 1949, did you

(Testimony of Adelbert E. Kellog.)

receive notification from the Supply Officer, Mr. Lewis, in connection [240] with those items?

A. I did.

Q. What part of the day, and what was the form of that notification, and how did Mr. Lewis contact you?

A. If I remember correctly, I believe it was the day before that I received the notification.

Q. How did Mr. Lewis reach you?

A. Well, the messenger delivers the notification to the storeroom.

Q. You say that that was, as you recall, April 21st, 1949?      A. That is correct.

Q. Then on April 22nd did you receive any further word?

A. If I remember correctly, I had a telephone message from Mr. Lewis that somebody would be there——

Q. April 22nd?

A. That is correct.—to pick up these articles.

Q. Did someone come to you?

A. I never *say* anybody. Nobody comes to me about it.

Q. When did you first hear of the alleged accident involving Mr. Trubow?

A. Quite possibly two days later.

Q. Two days after the occurrence?

A. After the accident occurred.

Q. Mr. Kellog, in the course of your duties at the Marine Hospital do you use the freight elevator? [241]

(Testimony of Adelbert E. Kellog.)

A. Oh, yes, quite constantly.

Q. During the period from January, 1949, and particularly during the month of April, 1949, did you—and subsequent to April, 1949, did you use the freight elevator at the Marine Hospital?

A. I did.

Q. How frequently did you use it?

A. Pardon.

Q. How frequently did you use it?

A. Well, at least once a day, possibly more.

Q. Will you please examine Government's Exhibit for identification No. "I", paying particular attention to the picture representing the door strap; and will you also examine Defendant's Exhibit "A"? Have you examined those pictures?

A. I have.

Q. Will you tell us what floor is represented by the—on what floor the door represented by Government's Exhibit I, for identification, is?

A. That is what we normally call the kitchen entrance, or the first floor, I would say.

Q. Looking at Defendant's Exhibit "A" have you examined the picture of the strap?

A. I would say that was the same floor.

Q. That is the kitchen, or first floor?

A. That is the kitchen, or first floor. [242]

Mr. Lerer: They are both the same?

A. The best I can tell.

Mr. O'Gara: Q. You say they are both the same?

A. Yes, they are both the same.

(Testimony of Adelbert E. Kellog.)

Mr. O'Gara: At this time, your honor, we offer Government's Exhibit for identification "I" in evidence.

The Court: It will be admitted into evidence.

(Document previously marked Government's Exhibit "I" for identification was admitted into evidence as Government's Exhibit "I".)

Mr. Lerer: May I ask this question: This isn't the particular floor where the accident occurred, is that correct?

Mr. O'Gara: No, but it is offered in evidence only as evidence of the interior of the car, construction of the interior of the car.

Mr. Lerer: But the construction of the interior of the car has nothing to do with the strap because the strap stays on the second floor.

Mr. O'Gara: Yes.

Mr. Lerer: Then why is it being introduced in evidence? You have a picture of the inside of that elevator. We are concerned with the strap.

The Court: It is the same elevator on the floor above. Its probative value can be argued, but it is admitted into evidence. [243]

(Thereupon, photograph previously marked Government's exhibit "A" for identification, was admitted into evidence as Government's Exhibit "A".)

Mr. O'Gara: Q. Look at Defendant's Exhibit "D". Have you examined that picture?

A. I have.



(Testimony of Adelbert E. Kellog.)

Q. You have testified you used the elevator in April, 1949. Did you use the elevator in April, 1949, in the basement; that is, did you use the elevator on the basement floor as well as other floors?

A. That is correct.

Q. Will you tell us whether or not you can identify the picture of the strap shown in Defendant's Exhibit "D"?

A. I believe this is the strap in the basement.—

Mr. Lerer: I am going to object to that.

Mr. O'Gara: Q. Basement door?

A. Yes.

Mr. Lerer: He says he believes. He doesn't say it is. It is a question of opinion.

The Court: The form of the answer he makes is speculative, and therefore I sustain the objection and strike the answer. However, you may interrogate the witness further in order to get an answer in proper form. What we are interested in is not a supposition or belief, but your best recollection and your best opinion. [244]

A. Well, I might say my best opinion would be that I identify that as being the basement strap because, well, the length of it from the other straps on other floors.

Mr. O'Gara: Q. How long was that strap?

A. I should say between eight and ten inches.

Q. When you operate that door, was that the strap on the basement door?

Mr. Lerer: I object to all this line of questions, may it please the Court, upon the ground that it

(Testimony of Adelbert E. Kellog.)

hasn't been established on April 22, 1949, this man was on the elevator and used the strap.

The Court: He says he used it almost once a day.

Mr. Lerer: Yes, almost once a day.

The Court: During April. Counsel, in view of the objection that is made I would suggest that you lay a closer foundation as to whether he used it on that day.

Mr. O'Gara: Yes.

Q. Mr. Kellog, on April 22nd, 1949, were you performing your usual duties?

A. That is correct.

Q. Did your duties take you from the floor on which the storekeeper's office is located to other floors?

A. On that particular day, I have to answer?

The Court: If you can.

Mr. O'Gara: Q. Tell us——

A. Well, I would say yes.

Q. Your best recollection is that you did? [245]

A. That is correct. We get our deliveries every day through that particular elevator.

Q. The storekeeper's office is located on the bottom floor? A. Basement floor.

Q. And you went from that floor to the higher floors?

A. That's right, where I picked up my deliveries.

Q. In going from the basement to the higher floors on April 22nd did you use the freight elevator?

A. I did.

(Testimony of Adelbert E. Kellog.)

Q. Examining Defendant's Exhibit "D", does that photograph refresh your recollection as to what, if any strap, was present in the car, or rather at the basement door of the freight elevator?

A. That is the basement door strap to the elevator, inside of the elevator.

Q. Will you tell us, Mr. Kellog, whether that is the strap, if you recall, which you used on April 22nd in using the elevator and starting from the basement of the Marine Hospital?      A. That is.

Q. That is? Do you know, Mr. Kellog, whether or not that strap remained on the basement door of the Marine Hospital freight elevator after April 22nd? Did it continue to be there as best you can recall?

A. I am quite certain it was.

Q. The same strap? [246]

A. That is right.

Q. And was used by you subsequent to April 22nd.

A. (Nodding affirmatively.)

Mr. O'Gara: We have no further questions, your Honor.

The Court: You may cross examine.

Cross Examination

By Mr. Lerer:

Q. Do you remember which day April 22nd, 1949 was—Monday, Tuesday, Wednesday?

A. I can't say.

Q. You don't recall?      A. No.

Q. Do you remember anything else that occur-

(Testimony of Adelbert E. Kellog.)

red on April 22, 1949, connected with your job? Do you remember anything about April 22nd, 1949?

A. I do know that the first storekeeper was on his vacation.

Q. For what period of time?

A. I believe it was two weeks.

Q. But I am talking about on April 22nd, 1949. Can you remember anything you did on that particular day? You don't recall, do you?

A. I can't honestly say I recall anything other than that I was very busy.

Q. If there are repairs made to the elevators you wouldn't be informed about it, would you? That is not your department, is that correct? [247]

A. That is correct.

Q. If the repairman came along and put a strap up you wouldn't know about it particularly, would you? They didn't report to you, did they?

A. No, they didn't report to me.

Q. So when you use the elevator daily, as you say, and reach up to pull the strap down, you don't know whether that strap is the same as April 22nd, 23rd, 24th, or whether it was changed or wasn't changed, isn't that correct? You just know there is a strap, is that right? A. There is a strap.

Q. There is nothing about this particular picture as you look at it now which refreshes your memory that this strap was on the door of the basement on April 22nd, 1949, is there?

A. I believe I can remember back there to that

(Testimony of Adelbert E. Kellog.)

time because of the fact that I never heard of the accident until two days afterwards.

Q. All right. What about two days after the accident makes you think that the strap was on—I will withdraw that question. This is the Government's picture, Defendant's Exhibit "C". I show you that. Now, would you compare it with this particular picture, Defendant's Exhibit "D" and let me know if there is any difference between those two pictures as to straps?

A. This picture was taken from the outside. [248]

Q. I am just asking you about the straps?

The Court: He is asking you if there is any difference?

A. I don't see any strap there.

Mr. Lerer: No.

The Court: Referring to Exhibit "C".

Mr. Lerer: Yes.

Q. So that there is no strap there?

A. I don't see any.

Q. So if you were told that when this picture was taken there was no strap there, or the strap was high above so it couldn't be seen, would you say that that was the proper condition of the strap on April 22nd, 1949? Did I make myself clear? In other words, looking at this picture, Defendant's Exhibit "C"?

Mr. O'Gara: Your Honor, I object to the form of the question. The testimony of the witness, and every witness, in respect to this picture "C" is that it doesn't show any strap there.

Mr. Lerer: We all stipulate to that, and the pic-

(Testimony of Adelbert E. Kellog.)

ture speaks for itself. Do I understand arbitrarily somebody who took this picture for the government just held the strap up not to show it?

The Court: That is again argument.

Mr. Lerer: Yes, it is.

The Court: The point is, the question hasn't been [249] completed yet, Mr. O'Gara. Let him ask the question. He asked one and then amplified it, so ask your question and make your objection and we will move along.

Mr. Lerer: Q. April 22nd, 1949, if you were in the elevator on the bottom floor, and the elevator resembled that picture, how would you shut the door in order to have the elevator move up?

A. If I were in the elevator?

Q. Yes.

A. I would have reached up and grabbed the strap that was inside the elevator.

Q. In other words, I take it there can be a strap over and above the lower part of the upper elevator door that doesn't protrude down, is that correct?

A. That isn't shown here.

Q. But that is probably, too, is it not, Mr. Kellog?

A. I don't believe so.

Q. Do I understand all straps on the doors of these elevators are complete and long, ten inches long, is that correct?

A. Well, they are possibly a little longer.

Q. And all straps are longer than ten inches, is that correct?

A. It is quite possible.

(Testimony of Adelbert E. Kellog.)

Q. Well, you are a man that is in these elevators every day [250] and are reaching up and grabbing these straps, are you not?

A. To close the elevator.

Q. And all straps are—Well, you know the lengths of those straps is over ten inches, probably twelve inches long, is that right?

A. Well, I would say they were twelve inches, ten or twelve inches.

Q. And all straps are that length, are they not? That length?

A. I never measured them.

Q. Pardon?

A. I never measured them. I know they have enough there to grab hold of.

Q. Well, Mr. Kellog, you would say when these straps are broken in any respect they are removed and replaced, is that correct?

A. They have been.

Q. Not have been, but are they as a matter of your own knowledge?

A. Well, they never consult me. I am not in that department. They don't tell me about that.

Q. You are not familiar with whether a strap is short, long or broken?

A. I am familiar with the fact that I can—there is enough there to pull on down the elevator. [251]

Q. And sometimes there is just enough, perhaps, for you to grab with your fist and pull down, is that correct?

(Testimony of Adelbert E. Kellog.)

A. No, you don't grab with your fist. You take hold of the strap this way (indicating).

Q. Sometimes the straps are short enough you can't get a hold around and grab them and pull them down, is that correct?

A. I don't think I have ever experienced that in the elevator.

Q. Have you ever had occasion to put your hand underneath here and—referring to Defendant's Exhibit "C"—that is the handle. Have you ever had occasion to put your hand there and pull that door down?

A. Only when I stood outside.

Q. And there are no straps on the outside at all, are there?     A. No.

Q. Just inside? I show you Plaintiff's Exhibit 4 and ask you if you can identify that? Can you identify that, Mr. Kellog?

A. That is the piece of an elevator door.

The Court: What is that?

A. The basement—the entrance to the elevator.

The Court: With the doors open?

A. With the fire door open. Just a screen there.

The Court: With the—I see what you mean. Distinguish between the screen door and the metal door when it is closed. [252]     A. Yes.

Mr. Lerer: Q. Would you say that represents a true and correct picture of the elevator door and everything connected with the door on April 22nd, 1949?



(Testimony of Adelbert E. Kellog.)

A. That is the screen door. That is not the fire door.

Q. In other words——

A. I would say this is a picture of the screen door closed.

Q. Would you say that is a true and correct picture of what it represents on April 22nd, 1949?

A. I would say so.

Q. Yes. I show you Plaintiff's Exhibit 2 and ask you if you can identify that?

A. This is the basement door of the elevator.

Q. Would you say that represents a true and correct picture of the elevator and all its appurtenances on April 22nd, 1949. With the exception of the figures, of course. The men are excluded from the picture. Would you say that is a correct picture?

A. I would say that was a correct picture.

Q. Thank you. Calling your attention again to your work during April, 1949, what are your hours there, Mr. Kellog?

A. 8:00 o'clock to 4:30.

Q. 8:00 o'clock to 4:30?

A. Half an hour for lunch.

Q. How many men are in your department in the storekeeper's? [253]

A. There are four.

Q. Four? A. Yes, sir.

Q. Are there any other people that work on that bottom floor?

A. There are some. I believe one laundryman.

Q. How many people altogether work on that floor besides you four people?

(Testimony of Adelbert E. Kellog.)

A. Two carpenters, the laundryman, and at that time I believe there were just two painters.

Q. How many people had occasion to come downstairs to the basement? Many people come down there at all?

A. Well, I don't see everybody that comes down because my office where I work isn't close to the elevator.

Q. Those refrigerators were moved, weren't they, Mr. Kellog, or are they still there?

A. I didn't see them out there, to the best of my knowledge, two days later.

Q. So two days after the 22nd of April those refrigerators had been moved, is that correct?

A. To the best of my knowledge.

Q. Do you know by whom they were moved?

A. No, I don't.

Q. Did you say something about the beds?

A. No, I didn't.

Q. Did you see the beds there in the storeroom?

A. To the best of my knowledge there were some beds in that shipment, but——

Q. Weren't those removed on the 21st, the day previous to the removal of the refrigerators?

A. I couldn't say honestly. I couldn't honestly say.

Q. Mr. Lerer: Can we take a little recess, your Honor? May we have just a recess for a few minutes? I have never spoken to this next witness.

Mr. O'Gara: May we finish with this witness before recess?

(Testimony of Adelbert E. Kellog.)

Mr. Lerer: I don't know whether I am through. It will just be a few minutes and we can let him go.

The Court: Yes, let's have a short recess of five minutes and then resume. Before we go to recess let me ask a question: You have finished the cross examination of this witness, then Mr. Leiberman, and that is it.

Mr. Lerer: I think so.

The Court: Do you have any further witnesses?

Mr. O'Gara: No.

The Court: All right.

(Thereupon, a short recess was taken.)

Mr. Lerer: Q. Mr. Kellog, here is Defendant's Exhibit "I," and I will ask you to identify which floor that elevator is on, and door?

A. I would say that was the kitchen or first floor. [255]

Q. Why do you identify it as such?

A. The tiling.

Q. Showing you Defendant's exhibit "A," can you tell me which floor that is on, that elevator and door?

A. I would say that was the same floor.

Q. That is the one above the basement?

A. You are inside the elevator looking toward the fire door.

Q. So that would show the floor above the basement?

A. That is correct.

Q. And what is there about this picture which

(Testimony of Adelbert E. Kellog.)

makes you believe that is the second floor, rather, the floor above the basement?

The Court: Again referring to "A"?

Mr. O'Gara: Yes, your Honor.

A. The window here, for one thing.

Mr. Lerer: Q. What about the window?

A. The mark on it, and I think I can see a glass, a wire glass door.

Q. Is that screen and the wire glass door on—are they on all floors with the exception of the basement?

A. The basement, I believe the fire door has nothing but a screen.

Q. And all other floors have a wire window with a white line across it?

A. That is right. [256]

Q. What is there that differentiates the first floor from the second, third, and the rest of the floors so far as the elevator and doors are concerned?

A. Well, that is the only thing I could tell you, I believe.

Q. So these pictures might be the first, second, third floor?

A. No, it couldn't be the basement.

Q. Excluding the basement, it could be any other floor in the hospital?

The Court: You are talking about "A"?

Mr. Lerer: Yes.

Q. Is that correct, Mr. Kellog?

A. The third floor, I believe, if you were looking out there you could see another little smaller—

(Testimony of Adelbert E. Kellog.)

Q. Let's confine ourselves to Defendant's Exhibit "A". You say that looks like the first floor above the basement? A. Yes.

Q. Because of the mesh glass and white line, which the other floors have just the same, is that right?

A. No, the third floor, the operating room, if I were looking out through I am quite sure I would see another smaller.

Q. No, confine yourself to this picture.

A. I am.

The Court: He is saying if it were at the third floor it wouldn't show that through the window. [257]

A. You wouldn't get a clear view through the window.

Mr. Lerer: Q. Let's eliminate the third floor. What about the other floors?

A. You would on the second floor.

Q. Yes. Sixth floor, fifth floor?

A. We only have the basement and the first floor, the second floor and the third floor.

Q. So by your description this could be the door of the elevator at either the first or second floor?

A. First or second.

Q. But you have testified, have you not, that this is a picture of the first floor, referring to Defendant's Exhibit "A"? You stated that definitely is a picture of the first floor, did you not?

A. I believe I did.

Mr. Lerer: Yes. I think that is all.

The Court: Further direct examination?

(Testimony of Adelbert E. Kellog.)

(Testimony of Adelbert E. Kellog.)

Redirect Examination by Mr. O'Gara:

Q. Mr. Kellog, looking at Exhibit "I," will you please examine the picture of a strap there; and looking at Defendant's Exhibit "A," will you examine the picture in respect to the strap?

Mr. Lerer: What was the question?

The Court: He said to look at them and examine them.

Mr. O'Gara: Q. You have examined them? [258]

A. Yes.

Q. Does your examination refresh your recollection as to whether or not the same strap is pictured in both pictures?

Mr. Lerer: That is the first floor, is it not, counsel, so we get it straight?

Mr. O'Gara: Yes.

Mr. Lerer: That has nothing to do with where the accident occurred?

Mr. O'Gara: That is correct.

A. It looks similar.

Q. (By Mr. O'Gara): Same strap?

The Court: You said it looks similar?

A. Yes.

The Court: By that do you mean it is the same strap? A. Well, they look very much the same.

The Court: Well, from your examination of the two pictures would you say they are pictures of the same elevator strap on the same floor?

A. I would say they were.

The Court: All right.

(Testimony of Adelbert E. Kellog.)

Q. (By Mr. O'Gara): Mr. Kellog, is there a light in that elevator?

A. Yes, there is a light there. There is an electric light.

Q. Do you know whether in April, 1949—April 22nd—there was such a light? [259]

A. I wouldn't say on that particular day, I couldn't remember there being a light. I know there is a light there for the purpose of use of the elevator.

Q. Inside the elevator? A. Inside.

Q. That elevator is a push button elevator so far as the operation of the car is concerned?

A. It is manually operated, inside.

Q. There is a lever to work—

A. That is correct.

Q. —inside the car? A. Yes.

Mr. O'Gara: No further questions.

#### Recross-Examination

Q. (By Mr. Lerer): Do you remember when that light was put in the elevator?

A. There has always been a light, to my knowledge, up above the screening of the elevator.

Q. Into the elevator itself, are you sure of that?

A. It shines into the elevator, yes. There is a screen there on top.

Q. Would you say—

A. Just above the screen.

Q. Would you say April 22nd, 1949, there was a light inside of the elevator? Would you testify under oath to that, Mr. Kellog? [260]

A. All I could give you was the fact that there

(Testimony of Adelbert E. Kellog.)

was an electric—I won't say there was a light there, but there was a place for the light.

Mr. Lerer: That is all, Mr. Kellog.

Mr. O'Gara: No further questions.

(Witness excused.)

\* \* \* \* \*

### JESS LIEBERMAN

called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

#### Direct Examination

Q. (By Mr. Lerer): State your name, residence and occupation?      A. Jess Lieberman.

Q. You reside in San Francisco, Mr. Lieberman?

A. Yes, sir, I do.

Q. What is your business?

A. My business is scrap metal, and I have an avocation as photography.

Q. April 22nd, 1949, you were in the business of being a scrap metal dealer?      A. That is correct.

Q. And you had an avocation of being a photographer?      A. Right. [261]

Q. Did you have occasion to take pictures of an elevator and door in the basement of Marine Hospital some time after April 22nd, 1949?

A. Yes, I did.

Q. And about how long after April 22nd?

A. I believe it was about two days after.

Q. I show you Plaintiff's Exhibits 2, 3 and 4, and ask you if you can identify those photographs?

A. They look like the photographs that I took.



(Testimony of Jess Lieberman.)

Q. As a matter of fact, they are the photos that you took, or prints of the photographs you took, is that correct? A. Yes.

The Court: What are the numbers?

Mr. Lerer: 2; 3 and 4, your Honor.

Q. Showing you Plaintiff's Exhibit 2, is that a— does that represent a correct picture as you saw it on that particular day? A. That is right.

Mr. O'Gara: Your Honor, I think—

Mr. Lerer (Interposing): That was what he knows of his own knowledge.

The Court: Overruled. Proceed.

A. That is the way the elevator was.

Q. (By Mr. Lerer): Taking that picture did you see any strap hanging down? [262]

A. There was no evidence of any way of closing the door from the inside.

Q. I show you Plaintiff's Exhibit 4 and ask you if that is a correct picture of the condition of the elevator at the time you saw it at the time—on the occasion that you took the picture?

A. This doesn't look like the same elevator.

Q. Let's get this straight. This Plaintiff's Exhibit 4 is a picture of the door being flush to the top and the bottom part of the door being here. Does that refresh your memory? That was taken by you. And the mesh of the door on the elevator?

A. Oh, yes, I remember this now.

Q. Does that represent the condition of the elevator and door as you saw it on the day the picture was taken?

(Testimony of Jess Lieberman.)

A. With the door—Both doors were open.

The Court: Both metal doors, top and bottom?

A. Yes.

Q. (By Mr. Lerer): Was there any strap protruding at that time? A. I didn't see any.

Q. Did you have occasion to take any pictures of the inside of the elevator?

A. No, I didn't take any pictures of the inside of the elevator. [263]

Q. Why? A. I didn't see any evidence—

Mr. O'Gara: Your Honor, I think that is immaterial.

Mr. Lerer: You asked the question, counsel.

The Court: That is cross-examination.

A. I didn't see any way of closing the door from the inside.

#### Cross-Examination

Q. (By Mr. O'Gara): Mr. Lieberman, where do you work? A. M. Bercovich, 940 6th Street.

Q. Do you work for Mr. Trubow?

A. I work with him.

Q. How long have you worked with him?

A. I would say about four years.

Q. Where have you worked with Mr. Trubow?

A. M. Bercovich Scrap Metal.

Q. He has been employed there with you four years?

A. He wasn't employed continually during that period.

Q. But he was on the payroll during some of that time?

(Testimony of Jess Lieberman.)

A. He was on the payroll part of the time.

Q. As an employee? A. Right.

Q. Of M. Bercovich? A. Right.

Q. In what capacity?

A. As a buyer and foreman in the yard.

Q. What is your capacity? [264]

Q. Working over or under Mr. Trubow in rank?

A. That is pretty hard to answer. He had his job and I had mine.

Q. Does Mr. Trubow work for you or do you work for Mr. Trubow?

A. Neither. We both work for M. Bercovich.

Q. Who was there first? A. Sir?

Q. Who was there first?

A. Who was there first?

Q. Yes. A. I was.

Q. How much longer before Mr. Trubow came to work? A. About a year, year and a half.

Q. Do you know of any other employment Mr. Trubow has besides that at M. Bercovich's?

A. I don't know of any definitely.

Q. Do you know of any other?

A. I don't follow your question.

Q. Do you know of any other employment Mr. Trubow has besides the employment you have just described? A. You mean at the present time?

Q. During the period January, 1949, to the present time?

A. No. When he was off the payroll he was buying for us on commission. [265]

(Testimony of Jess Lieberman.)

Q. What period of time was he off the payroll and buying on commission?

A. I believe it was from March of 1950 he went off the payroll and came back in October or November.

The Court: You mean March, 1949, don't you?

A. I believe it was, yes, 1949. I am sorry. I am hazy on the date.

Mr. O'Gara: October or November?

A. I believe somewhere around there.

Q. Do you have charge of the preparation of the withholding tax return for M. Bercovich Company?

A. I have.

Q. During the period you have just spoken of did you make a withholding tax return for Mr. Trubow?

A. I honestly don't remember.

Q. You could have?

A. Well, I wouldn't say yes or no until I looked at the records.

Q. Since when have you been a photographer?

A. Commercially or as a hobby?

Q. Either.

A. I have been, I guess, twenty-five or thirty years I have been an amateur photographer.

Q. Where are your negatives?

A. They are home. [266]

Q. You didn't bring them to Court? A. No.

Q. You say positively these prints represent the entire negatives?

A. No, I wouldn't say that. They may have been cropped on the edge a little bit.

(Testimony of Jess Lieberman.)

Q. The top and bottom, perhaps?

A. No, not top or bottom.

Q. Are you positive of that? A. Positive.

Q. What conversation did you have in the elevator, or about the premises there regarding the elevator, with Mr. Trubow when you took these pictures?

A. He asked me to come out and take that picture just to show the kind of door they had, and he showed me the door, and I examined it and took the picture that I thought would just show the door in its true sense.

Q. For what purpose?

A. He didn't tell me. He just asked me to take the picture for him.

Q. Isn't it a fact, Mr. Lieberman, he had a bandaged hand at the time the pictures was taken?

A. Yes.

Q. And you didn't know what the pictures were for?

A. I knew he wanted to show where his hand had been caught. [267]

Q. And in that connection did you have a conversation with Mr. Trubow about the operation of the elevator? A. Yes.

Q. You were there to assist Mr. Trubow in getting a picture that would assist this Court in reaching a determination? A. That is right.

Q. About the operation of that elevator by Mr. Trubow?

A. I know I made the remark that I had never

(Testimony of Jess Lieberman.)

seen an elevator door before that you had to close from the outside.

Q. To whom did you make that remark?

A. Mr. Trubow.

Q. You didn't take any picture of the inside of the door? A. No, I didn't. [268]

\* \* \* \* \*

The Court: Mr. Lieberman, I would like to ask you a question. When you took these photographs who was present besides Mr. Trubow, if anyone?

A. I believe the purchasing agent from the hospital was with us.

The Court: Was he present when you made these remarks about the strap?

A. I believe he was in the vicinity. Whether he overheard the conversation I don't know, but he posed in front of the button to get the elevator on one shot.

Q. (By Mr. O'Gara): Is that the picture of Mr. Lewis? A. I believe that is he.

Mr. O'Gara: That is the gentleman you refer to?

A. That is correct.

The Court: Let me have a look at that photograph. Oh, the man in the suit?

A. That is correct. I believe that was his capacity.

**I am not sure.**

The Court: All right. Any further questions in view of [272] the questions the Court asked?

Mr. Lerer: Just one. At the time you took the picture did you have occasion to look inside the elevator? A. I was inside for a minute, yes.

(Testimony of Jess Lieberman.)

Mr. Lerer: Did you see anything that resembled a strap?

A. If I remember correctly there was a stock of a hanger there where they had a piece, short piece of strap where one had broken off, similar to when your old hanger broke off on the street car.

Mr. Lerer: How long was it in its entirety?

A. I don't think it exceeded an inch.

Mr. Lerer: That is all.

Mr. O'Gara: That is all.

The Court: You are excused.

\* \* \* \* \*

[Endorsed]: Filed March 6, 1951.

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[Endorsed]: No. 12955. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Gerald J. Trubow, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed May 29, 1951.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 12955

UNITED STATES OF AMERICA,

Appellant,

vs.

GERALD J. TRUBOW,

Appellee.

On Appeal from the United States District Court  
for the Northern District of California, South-  
ern Division.

STATEMENT OF POINTS ON WHICH  
APPELLANT INTENDS TO RELY

The United States of America, Appellant, states that the points on which it intends to rely are as follows:

1. The district court erred in finding that the negligence of the defendant mentioned in the complaint caused plaintiff's injuries.
2. The district court erred in holding the United States liable under the Federal Tort Claims Act when there was no evidence that the accident involved resulted from a negligent or wrongful act on the part of a Government employee.
3. The district court erred in failing to hold that under the Federal Tort Claims Act the United States can not be held liable for breach of any duty at-



taching to the ownership, occupation, possession or control of property, in the absence of any negligent or wrongful act on the part of a Government employee.

4. The district court erred in holding the United States liable for the condition of its elevator where there was no evidence that any defect in the elevator was known to the United States, or any Government employee.

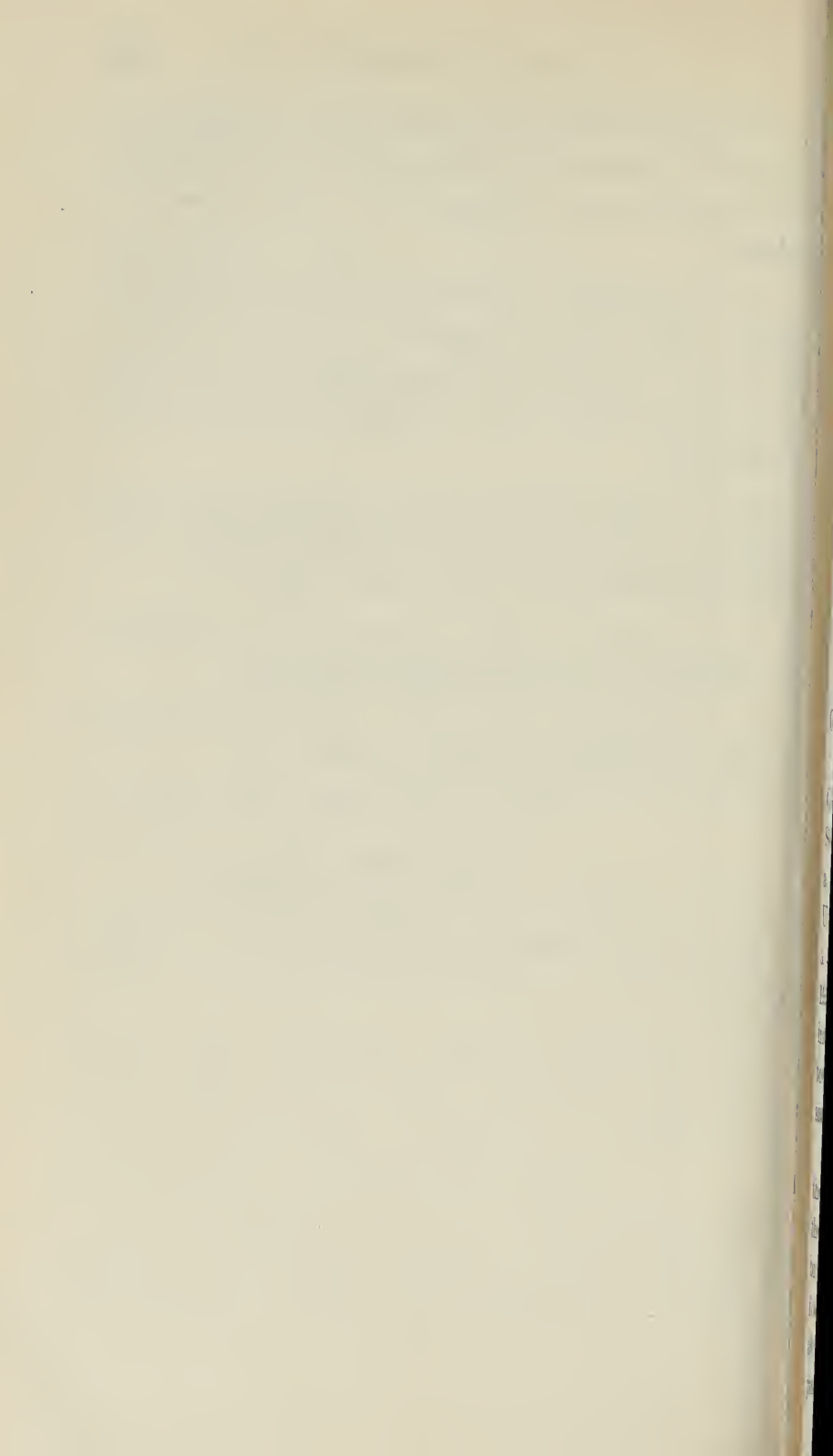
5. The district court erred in failing to make subsidiary findings of fact to support its ultimate conclusion that the United States was liable.

6. The district court erred in failing to hold that the plaintiff was contributorily negligent.

7. The district court erred in rendering judgment for the plaintiff against the United States.

/s/ CHAUNCEY TRAMUTOLO,  
United States Attorney,  
Attorney for Appellant.

[Endorsed]: Filed June 12, 1951. Paul P. O'Brien,  
Clerk.



United States Court of Appeals  
for the Ninth Circuit

No. 12955

UNITED STATES OF AMERICA,

vs.

GERALD J. TRUBOW.

MANDATE

United States of America—ss.

The President of the United States of America  
To the Honorable, the Judges of the United States  
District Court for the Northern District of  
California, Southern Division

Greeting:

Whereas, lately in the United States District Court for the Northern District of California, Southern Division, or before you or some of you, in a cause between Gerald J. Trubow, Plaintiff, and United States of America, Defendant, No. 2907-H, a Judgment was entered on the 30th day of January, 1951, which said Judgment is of record in said cause in the office of the clerk of the said District Court, to which record reference is hereby made and the same is hereby expressly made a part hereof,

And Whereas, the said defendant appealed to this court as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the Ninth Circuit by virtue of an appeal agreeably to the Act of Congress, in such cases made and provided, fully and at large appears.

And Whereas, on the 19th day of March, in the year of our Lord, one thousand nine hundred and fifty-two, the said cause came on to be heard before the said United States Court of Appeals for the Ninth Circuit, on the said transcript of record, and was duly submitted:

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is reversed and that this cause be, and hereby is remanded to the said District Court with instructions to make a finding upon the issue of contributory negligence; and further to make specific findings of facts in place and instead of the findings of fact by reference to paragraphs of the complaint as appear in the record.

(April 11, 1952.)

You, Therefore, Are Hereby Commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Fred M. Vinson, Chief Justice of the United States, the twelfth day of May, in the year of our Lord one thousand nine hundred and fifty-two.

/s/ PAUL P. O'BRIEN,  
Clerk, United States Court of Appeals for the  
Ninth Circuit.

[Endorsed]: Filed May 12, 1952.

In the United States District Court for the  
Northern District of California, Southern  
Division

No. 29077-H

GERALD J. TRUBOW,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW

The above-entitled cause having been remanded to this Court, with instructions to make further and additional findings and to make more specific findings, and the Court having duly considered the same and having considered the facts and the law now makes the following further and amended

Findings of Fact

I.

It is true that at all times herein mentioned, this action was brought pursuant to the provisions of the Federal Tort Claims Act, effective August 2, 1946, being Title Four, Public Law 601, Chapter 753, 79th Congress, 2nd Session.

II.

It is true that at all times herein mentioned said defendant, United States of America, was the owner and in possession and had control of those certain

premises, together with the buildings and improvements thereon, known and designated as the Marine Hospital, located in the vicinity of 14th Avenue and Lake Street, in the City and County of San Francisco, State of California, hereinafter referred to as said "Marine Hospital"; it is also true that said land and building was known and there used and maintained by the said defendant, United States of America, as a hospital.

### III.

It is true that at all times herein mentioned the plaintiff had an agreement with the defendant, United States of America, whereby the said plaintiff could enter upon the premises of said Marine Hospital for the purpose of picking up certain refrigerators and for the removal of same. It is also true that at all times herein mentioned, the plaintiff was on the premises of the said Marine Hospital as a business invitee of the defendant, United States of America.

### IV.

It is true that at all times herein mentioned visitors and business invitees were invited and permitted upon the premises of said Marine Hospital and to use the elevator and freight elevator located in said Marine Hospital, hereinafter referred to as said "freight elevator."

### V.

It is true that at all times herein mentioned the defendant, United States of America, through its agents, servants and employees, maintained, con-

trolled and operated the said freight elevator which the said visitors and business invitees of said Marine Hospital were invited by the said defendant, United States of America, to use.

## VI.

It is true that on or about the 22nd day of April, 1949, at or about the hour of 2:30 o'clock p.m., said plaintiff, as a business invitee, was upon the premises of said Marine Hospital, pursuant to the agreement hereinabove referred to, whereby said plaintiff was to supervise the picking up of certain refrigerators and the removal of same; that in pursuance thereof, it was necessary for the plaintiff to use a certain freight elevator located on the premises of said Marine Hospital; that said freight elevator had bi-parting doors and in order to close said doors, it was necessary to pull the upper door down, the lower door thereupon moving upward to meet said upper door midway; that normally a leather or canvas strap should be attached to the upper door for the purpose of pulling down said door; that said plaintiff was using the said freight elevator with the permission and invitation of the defendant, United States of America; that it was the duty of defendant, United States of America, through its agents and employees, to provide a strap for the purpose of pulling down the upper door of said elevator, as aforesaid; that on the day and at the time hereinabove mentioned, there was but an inch of strap material attached to the upper

door of said elevator, which was wholly inadequate as a strap for the purpose of manipulating said doors, and that there was no utilizable or regular strap thereon; that the defendant, United States of America, through its agents, servants or employees, knew or should have known that the said strap to be used for closing the said elevator doors was missing, and that the said defendant, United States of America, through its agents, servants or employees, failed or omitted to repair or replace said strap, and failed or omitted to warn plaintiff of said defect and danger; that by reason of the said failure to repair or replace or to warn plaintiff, the defendant, United States of America, through its agents, servants or employees, had negligently and carelessly maintained, operated and controlled the said elevator and doors thereof, and that such negligence and carelessness proximately caused plaintiff to sustain an oblique fracture through the distal end of the third metacarpal of the right hand, and to sustain bruises on plaintiff's body, all of which caused plaintiff to suffer intense pain; that the said defect and danger, as aforesaid, was not obvious or apparent to the plaintiff.

#### VII.

It is true that the injuries sustained by plaintiff are permanent in nature.

#### VIII.

It is true that the negligent and careless manner in which the defendant, United States of America, through its servants, agents or employees, main-



tained, operated and controlled the said freight elevator and the doors thereof, as aforesaid, constituted the immediate and proximate cause of the injuries received by the plaintiff.

## IX.

It is true that by reason of the carelessness and negligence of the defendant, United States of America, as aforesaid, and by reason of the injuries so sustained, said plaintiff has necessarily incurred liability for the services of a physician and surgeon in the sum of One Hundred Ninety-three Dollars and forty-nine cents (\$193.49), which sum is a reasonable amount for said services.

## X.

It is true that by reason of the carelessness and negligence of the defendant, United States of America, as aforesaid, and by reason of the injuries so sustained, said plaintiff has necessarily incurred liability for X-rays in the sum of Fifteen Dollars (\$15.00), which sum is a reasonable amount for said X-rays.

## XI.

It is true that said plaintiff was, at the time of said injuries, employed and earning the sum of Four Hundred Dollars (\$400.00) per month; that as a result of said injuries, the plaintiff was unable to work for a period of one (1) month, and that by reason of the carelessness and negligence of the defendant, as aforesaid, and by reason of the injuries so sustained, said plaintiff was damaged in the sum of Four Hundred Dollars (\$400.00) for

loss of earnings, no part of which nor the whole of said sum has been paid.

## XII.

It is true that by reason of the carelessness and negligence of the defendant, United States of America, as aforesaid, and by reason of the injuries so sustained by plaintiff, that plaintiff was further injured in the sum of Two Thousand Dollars (\$2,000.00), as and for general damages, no part of which nor the whole of said sum has been paid.

## XIII.

It is not true that the injury sustained by the plaintiff herein was proximately caused by the negligence and carelessness of said plaintiff, nor is it true that said plaintiff was himself careless and negligent in and about all the matters complained of in said complaint; it is true that the plaintiff acted as a reasonable, prudent man under similar circumstances would have acted in closing said elevator door.

## XIV.

It is not true that the plaintiff had the status of a licensee and came on the premises and into the said elevator for purposes of his own, thereby assuming all of the risks incident to the condition of the premises; it is true that the said plaintiff was a business visitor on said premises.

## XV.

It is not true that the defendant, United States of America, owed no duty of care to the plaintiff

in and about all the matters referred to herein; it is true that the defendant, United States of America, owed to the plaintiff the duty of repairing or replacing the defective strap or warning said plaintiff of said danger.

XVI.

It is true that the attorney for the plaintiff is entitled to attorney's fees in the sum of Five Hundred Twenty-one Dollars (\$521.00), which sum is not in excess of twenty per cent (20%) of the amount recovered by plaintiff, and which sum is a reasonable attorney's fees.

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

1. Plaintiff is entitled to judgment against the defendant in the sum of Two Thousand Six Hundred Eight Dollars and forty-nine cents (\$2,608.49);

2. Attorney for plaintiff is allowed Five Hundred Twenty-one Dollars (\$521.00) of the judgment herein, as attorney's fee;

3. Plaintiff is entitled to judgment against the defendant for his costs of suit incurred in this action.

Let judgment for plaintiff be entered accordingly.  
Done this 31st day of July, 1952.

/s/ OLIVER J. CARTER,

United States District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed July 31, 1952.

In the United States District Court for the Northern District of California, Southern Division

No. 29077-H

GERALD J. TRUBOW,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

### JUDGMENT

The above-entitled cause came on regularly for trial on January 5, 1951, before the Honorable Oliver J. Carter, United States District Judge, sitting without a jury; Charles O'Gara, Esq., Assistant United States Attorney, appearing on behalf of defendant, and Ben K. Lerer, Esq., appearing on behalf of plaintiff; oral and documentary evidence having been introduced on behalf of both parties; and the Court heretofore having made and caused to be filed herein its Written Findings of Fact and Conclusions of Law, and being fully advised:

Wherefore, by reason of the law and the findings of fact aforesaid, it is Ordered, Adjudged and Decreed that plaintiff have and recover against the defendant in the sum of Two Thousand Six Hundred Eight Dollars and forty-nine cents (\$2,608.49); and

It is further Ordered, Adjudged and Decreed that the attorney for plaintiff be and he is allowed Five Hundred Twenty-one Dollars (\$521.00) of the judgment herein as attorney's fee; and

It is further Ordered, Adjudged and Decreed that plaintiff have and recover his costs of suit herein from defendant, amounting to the sum of Twelve Dollars and seventy-five cents (\$12.75.)

Dated: July 31, 1952.

/s/ OLIVER J. CARTER,  
United States District Judge.

Lodged July 17, 1952.

[Endorsed]: Filed July 31, 1952.

Entered August 1, 1952.

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[Title of District Court and Cause.]

#### NOTICE OF APPEAL

Notice Is Hereby Given, that the defendant, United States of America, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment made and entered herein on July 31, 1952, in favor of the above plaintiff.

Dated: September 23, 1952.

/s/ CHAUNCEY TRAMUTOLO,  
United States Attorney.

/s/ CHARLES ELMER COLLETT,  
Assistant United States Attorney, Attorneys for  
Defendant.

[Endorsed]: Filed September 24, 1952.

[Title of District Court and Cause.]

STIPULATION RELATIVE TO RE-USE OF  
TRANSCRIPT AND BRIEFS OF FORMER  
APPEAL

It Is Hereby Stipulated by and between the attorneys for plaintiff and defendant herein as follows:

1. That the transcript of record of the above-entitled matter heretofore used in the United States Court of Appeals for the Ninth Circuit entitled *United States of America, Appellant, vs. Gerald J. Trubow, Appellee*, Appeal No. 12,955 of said Court, may be used and adopted as part of the record on appeal in the instant matter.

2. The briefs of the appellant and appellee in the appeal heretofore decided in the United States Court of Appeals for the Ninth Circuit entitled *United States of America, Appellant, vs. Gerald J. Trubow, Appellee*, Appeal No. 12,955 of said Court, may be used as part of the briefs to be submitted by the plaintiff and defendant in the instant appeal.

It Is Further Stipulated by and between the parties hereto that an additional transcript of record shall be printed for the purpose of use in the instant appeal consisting of the order of remand of the Court of Appeals in the prior appeal herein, the findings of fact, conclusions of law and judgment entered into by the above-entitled district court on July 31, 1952, and defendant's notice of appeal, dated September 23, 1952.

It Is Further Stipulated by and between the parties hereto that the plaintiff and defendant

herein shall have the right to file Supplemental Briefs in their behalf in addition to the briefs that have herein been stipulated are to be used in connection with the instant appeal.

Dated: December 9, 1952.

/s/ CHAUNCEY TRAMUTOLO,  
United States Attorney;

/s/ FREDERICK J. WOELFLEN,  
Assistant United States Attorney, Attorneys for  
Defendant.

/s/ BEN K. LERER,  
By /s/ CHARLES O. MORGAN, JR.,  
Attorneys for Plaintiff.

[Endorsed]: Filed December 10, 1952.

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK  
TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in the above-entitled case and that they constitute the record on appeal as designated by the attorneys for the appellant:

Mandate.

Findings of fact and conclusions of law.

Judgment.

Notice of appeal.

Order extending time to docket appeal, filed Oct. 29, 1952.

Order extending time to docket appeal, filed Dec. 10, 1952.

Stipulation relative to re-use of transcript and briefs of former appeal.

Designation of record on appeal.

Plaintiff's Exhibits 1 to 6.

Defendant's Exhibits A to N.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 11th day of December, 1952.

[Seal] C. W. CALBREATH,  
Clerk.

By /s/ C. M. TAYLOR,  
Deputy Clerk.

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[Endorsed]: No. 13654. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Gerald J. Trubow, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed December 11, 1952.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.



In the United States Court of Appeals  
for the Ninth Circuit

No. 13654

UNITED STATES OF AMERICA,

Appellant,

vs.

GERALD J. TRUBOW,

Appellee.

STATEMENT OF POINTS ON WHICH  
APPELLANT INTENDS TO RELY

The United States of America, Appellant, states that the points on which it intends to rely are as follows:

1. The district court erred in finding that the negligence of the defendant mentioned in the complaint caused plaintiff's injuries.

2. The district court erred in holding the United States liable under the Federal Tort Claims Act when there was no evidence that the accident involved resulted from a negligent or wrongful act on the part of a Government employee.

3. The district court erred in failing to hold that under the Federal Tort Claims Act the United States can not be held liable for breach of any duty attaching to the ownership, occupation, possession or control of property, in the absence of any negligent or wrongful act on the part of a Government employee.

4. The district court erred in holding the United States liable for the condition of its elevator where there was no evidence that any defect in the elevator was known to the United States, or any Government employee.

5. The district court erred in failing to hold that the plaintiff was contributorily negligent.

6. The district court erred in rendering judgment for the plaintiff against the United States.

Dated: December 10, 1952.

/s/ CHAUNCEY TRAMUTOLO,  
United States Attorney,  
Attorney for Appellant.

By /s/ FREDERICK J. WOELFLEN,  
Assistant United States Attorney, Attorney for  
Appellant.

Service of copy attached.

[Endorsed]: Filed December 10, 1952.

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[Title of District Court and Cause.]

**APPELLANT'S DESIGNATION OF PARTS  
OF RECORD TO BE PRINTED**

The United States of America, appellant herein and Gerald J. Trubow, appellee above named, having heretofore entered into a stipulation wherein said parties agreed that the transcript of the record of the above-entitled matter used in the United

States Court of Appeals for the Ninth Circuit entitled United States of America, appellant, vs. Gerald J. Trubow, appellee, Appeal Number 12955 could be used in the docket as a part of the record on appeal in the instant case, and said parties having further agreed that they could supplement said previously used transcript of record for use in the instant appeal.

United States of America, appellant, designates the following parts of the record to be printed in the appeal of the above matter and request that the Clerk print the same:

1. The Order of Remand of the Circuit Court of Appeals in Appeal No. 12955 of the United States Court of Appeals for the Ninth Circuit entitled United States of America, appellant, vs. Gerald J. Trubow, appellee;

2. Findings of Fact and Conclusions of Law and Judgment entered by the United States District Court for the Northern District of California, Southern Division, entered on July 31, 1952;

3. Appellant's Notice of Appeal;

4. Stipulation Relative to Re-Use of Transcript and Briefs of Former Appeal.

CHAUNCEY TRAMUTOLO,  
United States Attorney;

/s/ FREDERICK J. WOELFLEN,  
Assistant United States Attorney, Attorneys for  
Appellant.

[Endorsed]: Filed December 19, 1952.

The first part of the paper discusses the general principles of the theory of the atom, and the second part discusses the application of these principles to the case of the hydrogen atom. The theory of the atom is based on the assumption that the electron moves in a circular orbit around the nucleus, and that the angular momentum of the electron is quantized. The energy levels of the atom are determined by the quantization of the angular momentum, and the energy levels of the hydrogen atom are given by the formula  $E_n = -\frac{13.6}{n^2}$  eV, where  $n$  is the principal quantum number. The energy levels of the hydrogen atom are shown in the following diagram:

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